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# Reconstituting 'Original Intent:' A Constitutional Law Encyclopedia for the Next Century

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# THE ENDURING CONSTITUTION: A BICENTENNIAL PERSPECTIVE

*Robert F. Drinan**

THE ENDURING CONSTITUTION: A BICENTENNIAL PERSPECTIVE. By *Jethro K. Lieberman.* St. Paul: West Publishing Company. 1987. Pp. xvii, 483. $29.95.†

In 1976, the West Publishing Company, in order to celebrate its own one hundredth birthday and the nation's bicentennial, published *Milestones!: 200 Years of American Law*[1] by Jethro Lieberman. The book was a legal history of the United States based on eighteen events selected by a poll of American lawyers.

To celebrate the bicentennial of the Constitution, West Publishing Company again asked Mr. Lieberman to write a popular but solid book about the work of the fifty-five men at the Constitutional Convention in the summer of 1787 in Philadelphia. Mr. Lieberman, a graduate of Harvard Law School, and a successful journalist, as well as the author of *The Litigious Society*[2] (winner of the 1982 American Bar Association's Silver Gavel Award), has authored a very valuable book filled with little known historical facts about the two-hundred-year history of the U.S. Constitution. The book, entitled *The Enduring Constitution* is handsomely put together, and contains several truly splendid photos. The work is uncluttered by footnotes, although there are ample references and a bibliography.

By almost any norm, a reader has to conclude that Mr. Lieberman's book is a success. Its prose flows, and indeed is often captivating. "Sidebars" with photos and write-ups of the framers of the Constitution are universally interesting, and the book's nineteen chapters touch on every major issue confronted by the Supreme Court in almost two hundred years.

The downside of Mr. Lieberman's book is its "panegyric" tone. The author concedes this (p. 5), but exalts in the spirit of the bicentennial by seeking to "nurture a sophisticated reverence for the most suc-

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† This book was published simultaneously as THE ENDURING CONSTITUTION: AN EXPLORATION OF THE FIRST TWO HUNDRED YEARS. By *Jethro K. Lieberman.* New York: Harper & Row. 1987. Pp. xiv, 494. $27.95. — Ed.

1. J. LIEBERMAN, MILESTONES!: 200 YEARS OF AMERICAN LAW (1976).

2. J. LIEBERMAN, THE LITIGIOUS SOCIETY (1981).



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cessful charter of freedom the world has ever known" (p. 5). The author concedes that the five thousand words in the Constitution constitute one of the sources of American strength, but also notes that the freedom enjoyed by Americans may be the result of "our national character, and an open society" (p. 394).

Lawyers will find little new in this volume, but will happily discover here a remarkably good synthesis of the nature of the Constitution, and the 479 volumes of Supreme Court decisions explicating the Constitution. In the nature of things, the treatment of each issue has to be superficial. But the author, a skilled journalist who for many years was legal affairs editor of *Business Week*, has a talent for getting to the heart of issues, and explaining them in crisp prose. His fourteen pages on church and state (pp. 245-59), for example, focus on every major principle in that ever more tortuous area of constitutional law. The author does not suggest that he is undertaking a complete analysis of the tests employed by the Supreme Court to reconcile the establishment and the free exercise clauses of the first amendment. But Mr. Lieberman's straightforward prose gives coherence to a vast amount of material.

The author has, of course, attempted to synthesize in one book material adequate for several books — the story of the Constitutional Convention in 1787, the birth of the separation of powers, the struggles of the Supreme Court with slavery, and the post–Civil War amendments, along with the explosion of litigation in the last forty years over the guarantees of the Bill of Rights. It is all very readable — even for a person like this reviewer, who teaches Constitutional Law I and II. What is in short supply, of course — by design and not by default — is a serious attempt to analyze where the U.S. Constitution has been deficient. Mr. Lieberman is upbeat and glowing almost to a fault. He lauds the Constitution as a "marvelously intricate system, set into motion two centuries ago . . . capable of producing progressive and heartening change, even as it is always in danger of proceeding toward heartless change" (p. 395). Continuing the eulogy, he concludes his book with this flourish: "But it is the possibility of peaceful reform — toward more equal rights and more equal possibilities, toward more freedom from arbitrary, unknown law, for more people, rather than for fewer — that distinguishes the American system from all the others on the globe" (p. 395).

Good bicentennial rhetoric! But, again, Mr. Lieberman has an approach which is credible, plausible, interesting, and worthwhile.

The author of *The Enduring Constitution* makes it clear at every moment in his book that he is only summarizing or synthesizing the 353 books directly on the Constitution, listed in the New York Public Library. Similarly, he is just touching on the 150 articles directly on the Constitution published each year in legal periodicals. Mr. Lieber-

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man has done it all well even though he tends to overstate his case when, for example, he proclaims: "Let the bicentennial nurture a sophisticated reverence for the most successful charter of freedom the world has ever known — and let the commemoration also fan the flames of disputation that have kept it that way" (p. 5).

This very worthwhile volume, splendidly illustrated, is a welcome reminder that the United States Constitution has helped to save Americans from the twin disasters of anarchy and tyranny. What more could anyone ask of a nation's legal institutions?

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# RECONSTITUTING "ORIGINAL INTENT": A CONSTITUTIONAL LAW ENCYCLOPEDIA FOR THE NEXT CENTURY†

*David M. Skover**

ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION. By *Leonard Levy, Kenneth Karst* and *Dennis Mahoney.* New York: MacMillan Publishing Company. 1986. Four volumes. Pp. xciv, 2196. $320.

> [T]o understand what a constitution is, one must look . . . to two uses of the word "constitution" . . . . The first of these uses is "constitution" in the sense of composition or fundamental make-up. . . . The second use of "constitution" [is] . . . the action or activity of constituting — that is, of founding, framing, shaping something anew. . . . And yet, constituting is not just doing whatever one pleases. . . . To constitute, one must . . . establish something that lasts, which, in human affairs, inevitably means something that will enlist and be carried forward by others. . . . So, although constituting is always a free action, how we are able to constitute ourselves is profoundly tied to how we are already constituted by our own distinctive history.
>
> — Hanna Fenichel Pitkin[1]

Of the scholarly offerings that have accompanied the bicentennial celebration of the American Constitution, *The Encyclopedia of the American Constitution* is one of the most noteworthy. It is an original and innovative project, being the first encyclopedia of the Constitution ever compiled. Seeking to present "an epitome of all that is known and understood on the subject of the Constitution by the nation's specialist scholars" (vol. 1, p. x), it is an ambitious work. It is catholic in the diversity of viewpoints represented by its contributors, and in the range of its targeted audience. And, given eight years in planning and production, it must have been a labor of love for its creators.

For appreciative readers, *The Encyclopedia of the American Constitution* (hereinafter *Encyclopedia)* is likely to represent a great deal more. Considered in its entirety, the work describes, in a fairly bal-

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† © 1988 David M. Skover

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1. Pitkin, *The Idea of a Constitution,* 37 J. LEGAL EDUC. 167, 167-69 (1987) (original paragraph structure omitted).



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anced and accurate manner, the contemporary understanding of the American constitutional heritage. This heritage is portrayed as the product of the historical events, socioeconomic conditions, and political and philosophical beliefs which have been seminal to the evolution of a national people. The *Encyclopedia* reveals the Constitution to be both a symbol that mirrors and an ideology that molds the fundamental nature, the ethos, of America. It understands the Constitution in both of the senses of the word explained by Professor Pitkin: as a tradition that constitutes us, and as a practice that reconstitutes us; as something that we are, and as something that we do.[2]

So understood, the Constitution — or, more precisely, our vision of the constitutional heritage of the American people — is an apt subject for encyclopedic treatment. Indeed, the *Encyclopedia* exhibits the important functions that an encyclopedic work may serve in the legal culture of the twenty-first century. This review essay explores this thought. Part I describes the *Encyclopedia's* organizational structure, the interdisciplinary nature of its commentaries, and the divergent characters of its contributors. Part II considers the potential for its use and explores its role as the record of "original intent" for this century's constitutional "founders."

## I. THE FRAMEWORK OF THE ENCYCLOPEDIA

In his celebrated 1932 essay, "The Rôle of an Encyclopaedia in a Progressive Civilization,"[3] H.G. Wells argued that the intellectual and practical needs of the twentieth century required a new encyclopedic effort, with a distinctive structure and purpose. Its articles would synthesize the composite of knowledge in each field of study; its entries would be written, edited, and critically organized by outstanding authorities in that field.[4] Drawing upon "the genius of Diderot . . . which first revealed the power and importance latent in these great gatherings of fact and theory," the new encyclopedia would provide "the substantial basis of a modernized ideology."[5] At the same time that civilization's debt to tradition and established custom would be recognized, the encyclopedia would organize the new and growing knowledge of the age into an effective instrument of political and social reform. Wells' agenda for the modern encyclopedia largely char-

2. Professor Pitkin summarizes the first sense in which the term "constitution" is used — as the "characteristic frame or nature" — by submitting that it "is less something we *have* than something we *are*." In contrast, the second sense of the term "is neither something we have nor something we are so much as something we *do* — or at any rate *can* do." *Id.* at 167-68.

3. Wells, *The Rôle of an Encyclopaedia in a Progressive Civilization,* in THE WORK, WEALTH AND HAPPINESS OF MANKIND 763 (1932). Wells' exhortations on the modern encyclopedia were reiterated in a series of speeches and essays written in 1936 and 1937, and subsequently collected in H.G. WELLS, WORLD BRAIN (1938).

4. Wells, *supra* note 3, at 763-65.

5. *Id.* at 765.

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acterizes the standard criteria for evaluating encyclopedic efforts that have become virtually universally accepted since the middle of the twentieth century.

Clearly, the *Encyclopedia* fares well against measures of excellence for structure and organization.[6] The *Encyclopedia* comprises four volumes. The main body of volumes 1 through 4 contains approximately 2,100 entries arranged alphabetically according to subject. The entries vary in length, from brief definitions of terms to expansive treatments of important topics; the longer entries are pegged at approximately 6,000 words. All of the entries are liberally cross-referenced, identified by the use of small capital letters that are readily distinguished from the regular print. Most entries, and all of the longer ones, append a bibliography of authorities to suggest avenues for further research.

Volumes 1 and 4 include the utilities necessary for a research tool. The beginning of volume 1 presents alphabetized lists of the entries and the contributors. All indices and appendices are found at the end of volume 4. The appendices in volume 4 offer valuable amenities for the serious student of the Constitution. A more complete description of the structure and organization of the *Encyclopedia* can be found in the appendix at the end of this review.

Not only in its organization, but in its contents and contributors, the *Encyclopedia* proves exemplary. The articles can be classified into five general subject categories: constitutional law doctrines; celebrated figures in constitutional history; judicial decisions, primarily of the United States Supreme Court; public acts, including statutes, treaties, and executive orders; and commentaries on historical eras in constitutional law. The preface to the *Encyclopedia* establishes that about 55 percent of the work's total volume is committed to doctrinal concepts, 15 percent to people, 15 percent to case law, 5 percent to public acts, and 10 percent to historical surveys (vol. 1, p. vii).

The editors submit that the topics were chosen, and the information within the entries composed, so as "to bridge the disciplines of history, law, and political science" (vol. 1, p. vii). A mere browsing of the contents of any of the volumes would corroborate the degree to which the interdisciplinary dynamic of a subject is explored. For example, Professors Scheiber's and Elazar's entries on federalism iden-

6. A description of the "general principles of form" by which twentieth century encyclopedias are judged throughout the world is given in R. COLLISON, ENCYCLOPAEDIAS: THEIR HISTORY THROUGHOUT THE AGES 199 (2nd ed. 1966), a valuable work that provides a comprehensive and coherent account of the evolution of encyclopedias in world history. Among the most pertinent standards for judging excellence, articles are to be written and edited by subject specialists; liberal cross-references among articles must be provided; supplementary bibliographies are to be appended to longer subject articles; and, subject and person indexes are to be included. *Id. See generally Encyclopaedia and Dictionaries,* 18 ENCYCLOPAEDIA BRITANNICA 365, 366-73 (1987).

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tify the historical stages of federalism by way of the Supreme Court's case law and the predominant political theories of dual sovereignty and cooperative federalism.[7] Similarly, the historian Herman Belz traces the ideological concepts of statehood, nationhood, and federal supremacy through an analysis of the theories of union that were predominant in the nation's politics from 1789 to 1868.[8] Consider Professor Yale Kamisar's tract on the evolution of the *Miranda* doctrine,[9] which canvasses the history of the law of confessions with an eye to the doctrine's sociopolitical functions.

This intertwining of the strands of case doctrine, social history, political theory, and legal philosophy, is characteristic of the entries both as independent articles and as related parts of the larger work, and is ensured in part by the editors' selection of contributors. Although the editors wrote many of the articles themselves (over 875 entries or approximately 42 percent of the total work), 259 authors produced the remaining pieces. Among them, there are 41 historians, 53 political scientists, 145 law professors, 18 legal practitioners, 10 federal judges, 1 state judge, and 2 Congressmen (one current and one former). The balance includes policy analysts, economists, journalists, and publicists. Uniformly, the contributors are intellectual leaders in their respective fields of study; more often than not, they have pioneered definitive scholarly works in the particular subject matters addressed in their *Encyclopedia* articles.

As a group, the contributors present numerous and diverse perspectives on the Constitution. The different visions of the constitutional enterprise which the contributors individually hold are apparent in the substance and the tone of their entries.[10] Thus, we see the originalist perspective of former Judge Robert Bork in his article on constitutional review,[11] in contrast to the broader interpretivist

7. *See* Scheiber, *Cooperative Federalism,* vol. 2, p. 503; Scheiber, *Dual Sovereignty,* vol. 2, p. 588; Scheiber, *Federalism (History),* vol. 2, p. 697; and Elazar, *Federalism (Theory),* vol. 2, p. 704. The dynamic between the historical stages of federalism and the Supreme Court's promotion of federalism theories, as presented by Scheiber and Elazar, is consistent with the federalism analyses presented in Tushnet, *Rethinking the Dormant Commerce Clause,* 1979 WIS. L. REV. 125, and the dialectic in federalism doctrine and theory traced in Skover, *"Phoenix Rising" and Federalism Analysis,* 13 HASTINGS CONST. L.Q. 271 (1986). *Cf.* Van Alstyne, *The Second Death of Federalism,"* 83 MICH. L. REV. 1709 (1985); and Gelfand & Abrams, *Putting Erie on the Right Track* (forthcoming), both articles holding to a more linear concept of "result-oriented" federalism doctrine.

8. Belz, *Theories of the Union,* vol. 4, p. 1885.

9. The Anglo-American roots of the law of admissibility of extrajudicial confessions that culminated in the doctrine of Miranda v. Arizona, 384 U.S. 436 (1966), and the blows inflicted on the doctrine in the Burger Court era, are outlined in Kamisar, *Police Interrogation and Confessions,* vol. 3, p. 1400.

10. The editors confirm that they "encouraged the authors to write commentaries, in essay form, not merely describing and analyzing their subjects but expressing their own views. . . . In inviting authors to contribute to the *Encyclopedia,* we have sought to include a range of views." Vol. 1, p. ix.

11. Bork, *Judicial Review and Democracy,* vol. 3, p. 1061.

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method for constitutional exegesis suggested by Professor Gerald Gunther in his commentary on judicial review,[12] or the "structuralist" posture in Professor Charles Black's discussion of "relational" constitutional rights to be protected against infringement by private citizens in his essay on state action.[13] For yet another example, consider Justice Hans Linde's promotion of the independent development of state constitutional law:[14] he argues that interpretation of state constitutional guarantees "logically" precedes judicial resort to the federal Bill of Rights under the theory of violative state action that the fourteenth amendment contemplates,[15] a position which he has articulated forcefully in the past.[16]

It may be of interest to note the "whos" and the "whats" that are not represented, or arguably underrepresented, among the contributors. A number of notable scholars in constitutional law, history, and political theory are missing, although their absence understandably may not be due to any oversight by the editors.[17] Among these scholars are several who figure prominently in significant contemporary movements in constitutional thought, such as Critical Legal Studies, Feminist Jurisprudence, Law and Economics, and Libertarianism. Despite the presence of one Supreme Court Justice, William Brennan, on the Advisory Board for the *Encyclopedia,* no current or retired justices are contributors. Moreover, while eleven members of the judiciary have written articles, there is no equivalence in the representation of the federal and state lawmaking branches.[18]

Generally, the problem of obsolescence challenges the future functionality of any encyclopedia.[19] Even if revisions are not projected at

12. Gunther, *Judicial Review,* vol. 3, p. 1054.

13. Black, *State Action,* vol. 4, p. 1729.

14. Linde, *State Constitutional Law,* vol. 4, p. 1738.

15. *Id.* at 1741.

16. *See, e.g.,* Linde, *E Pluribus — Constitutional Theory and State Courts,* 18 GA. L. REV. 165 (1984).

17. A partial list would include Bruce Ackerman, Anthony Amsterdam, C. Edwin Baker, Derrick Bell, Lillian BeVier, Philip Bobbitt, Erwin Chemerinsky, Ronald Dworkin, John Hart Ely, Richard Epstein, Ray Forrester, Alan David Freeman, Lawrence Friedman, Marc Galanter, Lino Graglia, Neil Komesar, Max Lerner, William Lockhart, Catharine MacKinnon, Robert Nagel, David O'Brien, Richard Davies Parker, Judge Richard Posner, H. Jefferson Powell, Martin Redish, Charles Reich, David Richards, Susan Rose-Ackerman, Ronald Rotunda, Albert Sacks, Lawrence Sager, Terrance Sandalow, Bernard Schwartz, Geoffrey Stone, Cass Sunstein, Herbert Wechsler, Gordon S. Wood, and Charles Wright.

18. Among current federal legislators whose significant contributions to the constitutional enterprise in Congress may have been recognized by participation in the *Encyclopedia,* several would be obvious selections: Senators Joseph Biden, Orrin Hatch, Edward Kennedy, and Strom Thurmond, and Congressman Henry Hyde.

19. As the editors of the *Encyclopedia* themselves admit, "[i]n a project like this one, some risk of obsolescence is necessarily present." Vol. 1, p. ix. This risk is highest in the entries that focus most heavily on doctrinal concepts. Articles dedicated to Supreme Court cases or referencing Supreme Court doctrine are current as of the Court's October 1984 Term, ending in July of 1985. The editors sought to minimize the problem of obsolescence by "ask[ing] the authors of

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this time, however, the integrity and significance of the current *Encyclopedia* are not seriously compromised. Indeed, the practice of updating encyclopedias on an annual or biannual basis, common among the leading multi-volume general reference works published in America since the turn of the century, is not followed uniformly for "special interest" encyclopedias. The *International Encyclopedia of the Social Sciences,* also published by Macmillan and Free Press, serves as a classic example of a specialized encyclopedia that was only reissued in a completely new edition thirty years after it first appeared.[20] Once the reputation and the value of the *Encyclopedia* are firmly established, at least after a generation of use, it is possible that Macmillan and Free Press will issue "an encyclopedia that is entirely new, entirely expressive of the times."[21]

## II. AN ENCYCLOPEDIA FOR THE TWENTY-FIRST CENTURY: RECONSTITUTING ORIGINAL INTENT

In the preface to the *Encyclopedia,* the editors declare one of the purposes of their project: "This work seeks to fill the need for a single comprehensive reference work treating the subject [of the American Constitution] in a multidisciplinary way" (vol. 1, p. vii). Certainly, among the current surveys of American constitutional law, the *Ency-*

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articles on doctrinal subjects to concentrate on questions that are fundamental and of enduring significance." *Id.* The extent to which obsolescence truly threatens the value of the *Encyclopedia* would seem to depend on the functions that it may serve for the next generation of constitutional students and scholars, discussed in Part II, *infra.*

20. The ENCYCLOPAEDIA OF THE SOCIAL SCIENCES (E. Seligman & A. Johnson eds. 1930-35) was superseded by the INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES (D. Sills ed. 1968) [hereinafter INTERNATIONAL ENCYCLOPEDIA]. The associate editor of the original work, Professor Alvin Johnson, had tried to interest the foundations that had supported the first encyclopedia in financing a revision as early as 1950. In the Foreword to the 1968 publication, Johnson expressed sentiments that are relevant to the issue of obsolescence for any specialized encyclopedia:

> We who ardently wanted an encyclopedia agreed that the social sciences were undergoing rapid change, but they had always been undergoing change and would continue to do so. An encyclopedia could summarize the achievements of the outgoing generation. In twenty or thirty years we would need an entirely new encyclopedia, and another in twenty or thirty years after that.
>
> . . . .
>
> I had never believed in the practice of revising encyclopedias; I have always held that an encyclopedia, particularly one of the social sciences, should remain a historical document of its time and that each generation should have an encyclopedia — new from the ground up.

Johnson, *Foreword,* 1 INTERNATIONAL ENCYCLOPEDIA, at xii-xiii.

21. These were the dedicatory words of Professor Johnson that introduced the 1968 revision of the social sciences encyclopedia. Johnson, *Foreword,* 1 INTERNATIONAL ENCYCLOPEDIA, at xiii. The advantages of a completely new edition of an encyclopedia on the American Constitution over the periodic issuing of supplementary material should be obvious, given the nature of the subject matter. As a work that describes the evolving political, historical, and ideological heritage of a national people, to be current, the *Encyclopedia* must reflect differences in language and idea constructs, as well as describe changes in substantive legal doctrine or leading political and social figures. For one account of the potential for a modified liberal legal consciousness in future constitutional interpretation, *see* Collins & Skover, *The Future of Liberal Legal Scholarship: A Commentary,* 87 MICH. L. REV. (forthcoming).

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*clopedia* can be regarded as *sui generis.* It is distinct from the major treatises on constitutional doctrine and history precisely because of its encyclopedic character. The *Encyclopedia* is not an interrelated series of essays advancing the single theoretical perspective of a treatise writer.[22] Neither is it a collection of independent or previously published essays by diverse authors; its entries interlock conceptually to the extent that the *Encyclopedia* forms an integrated whole.[23]

Given these characteristics, the *Encyclopedia* serves at least two important functions as a research tool. First, for the novice in constitutional law study or in a particular area of interest in constitutional law, the work furnishes a useful starting point.[24] Written in a style and at a level of abstraction that should be accessible to the general reader, the entries suggest avenues for further investigation of the subject matter in their bibliographies of scholarly authorities. As the entries are the product of collaboration among contributors and editors who are subject specialists, the novice may be reasonably confident of the accuracy and reliability of factual information. Moreover, the wide spectrum of constitutional thought represented by the contributors should assure the novice of exposure to diverse perspectives. However one assesses the relative balance of viewpoints, the *Encyclopedia* clearly offers a more sweeping panorama of evaluative positions than can be gleaned from constitutional law treatises.

Second, the *Encyclopedia* may be instrumental in the teaching of constitutional law, legal history, political science, and philosophy, whether in law schools, or in graduate, undergraduate, or secondary schools.[25] Instructors will find it a source of background readings of manageable length and complexity which may be suggested or assigned to students. Unfortunately, for heavily attended classes, student access to the *Encyclopedia* may be restricted; considering the scope of the entire work and its retail price, only one or two copies are likely to be reserved in most public, university, and law school libraries. Perhaps interrelated entries on major doctrinal and theoretical subject matters could be collected in separate books, and offered in

22. Among constitutional law treatises, compare, for example, L. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988); C. ANTIEAU, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1960). Among texts of a related category, which may be classified as "hornbooks," compare, for example, J. NOWAK & R. ROTUNDA, CONSTITUTIONAL LAW (3d ed. 1986); B. SCHWARTZ, CONSTITUTIONAL LAW: A TEXTBOOK (1972); M. FORKOSCH, CONSTITUTIONAL LAW (2d ed. 1969); H. ROTTSCHAEFER, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW (1939).

23. *Compare,* UNITED STATES CONSTITUTIONAL & LEGAL HISTORY SERIES (K. Hall ed. 1987) (19 volumes).

24. The editors recognize that "[f]or some readers an encyclopedia article will be a stopping point, but the articles in this *Encyclopedia* are intended to be doorways leading to ideas and to additional reading, and perhaps to the reader's development of independent judgment about the Constitution." Vol. 1, p. x.

25. Apparently, the editors pointedly directed the contributors "to remember that the Encyclopedia will be used by readers whose interests and training vary widely." Vol. 1, p. x.

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paperback form as supplementary course materials. It is not difficult to imagine, for example, that a small volume containing only the essays canvassing constitutional history[26] would be of great interest to college and graduate students in history and political science. Or a slightly longer paperback containing the entries on cases, doctrinal concepts, theory, and major scholars in free speech and press law could be an extremely useful reference tool in a law or political science course on the first amendment.

Beyond these instrumental functions, the *Encyclopedia* may prove to be an important normative enterprise. It describes the individuals and actions that have shaped our federal governmental system over time and the ideas which have infused our national value structures — always with sensitivity to the interconnections among these various forces. In weaving the complex fabric that we currently recognize as "The Constitution," the *Encyclopedia* reveals the ideology that *constitutes* us as Americans. The *Encyclopedia* achieves a great deal more, however, when it depicts the national community that we openly acknowledge as our identity. Then it reinforces the beliefs and practices which, in their future application or modification, will *reconstitute* us as Americans. Consequently, the *Encyclopedia* manifests the Constitution in both senses of the term explained by Professor Pitkin.

These purposes for the *Encyclopedia* are confirmed by the editors' introductory comments on the nature of the Constitution:

> The Constitution is a legal document, but it is also an institution: a charter for government, a framework for building a nation, an aspect of the American civic culture. . . . In the final analysis today's Constitution is the product of the whole political system and the whole history of the many peoples who have become a nation. [vol. 1, p. vii]

By this analysis, the Constitution is a symbol of American civic culture. It mirrors the institutions and the norms that define that culture; but it also molds the practices and the beliefs that sustain and reshape that culture.[27] An understanding of the Constitution, then, requires

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26. Among the entries directed to constitutional history that might be gathered in a single work, certainly the series of articles entitled *Constitutional History*, covering the period from the pre-Revolutionary era to 1985, would be featured. For a list of these articles, see vol. 1, p. xxv.

27. The editors' understanding of the Constitution as "mirror and mold" itself reflects the earlier constitutional law scholarship by Professors Kenneth Karst and Leonard Levy. Karst discerns in the institution of law, and in the practice of the law, an expression of the "shared values" which define and support a community. The institution of law contributes to a sense of community "by establishing norms which identify a group as people who owe to each other not merely some specific obligation, but a loyalty whose boundaries are only vaguely defined." Karst, *Individuality, Community, and Law*, in LAW AND THE AMERICAN FUTURE 68, 76 (M. Schwartz ed. 1976). The practice of the law reinforces the community of shared values when litigants, lawyers, and jurists appeal to the norms in legal disputes. *See, e.g.*, Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. REV. 303, 373-74 (1986). This is especially the case for constitutional law, which identifies and reinforces the nation's ideology, the "American civic culture":

> In our society, one of the most prominent bridges between ideology and behavior is the law, particularly constitutional law. It is fair to say that the Constitution today is our pre-

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an all-encompassing knowledge of the influences that mirror and mold. It is just such a "holistic" study of the American civic culture — its history, politics, economics, and social thought, as well as its legal doctrine and theory — that the *Encyclopedia* sponsors.[28]

As such, this twentieth-century *Encyclopedia* may play a vital role in the twenty-first century. Because it chronicles meanings that the Constitution holds for contemporary generations of Americans, the *Encyclopedia* is a window into the late twentieth century's conceptions of the nation's constitutional heritage. For the twenty-first century scholar and student, it may expose the framework of issues and ideas that have been thematically crucial to constitutional law developments

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eminent symbol of nationhood and that the doctrine of judicial review is a major practical support for both the attitudinal and the behavioral elements of the American civic culture.

*Id.* at 373 (footnote omitted); *see also* Karst, *The Supreme Court, 1976 Term — Foreword: Equal Citizenship Under the Fourteenth Amendment,* 91 HARV. L. REV. 1, 9-10, 27 (1977); Karst, *The Freedom of Intimate Association,* 89 YALE L.J. 624, 626, 666 (1980).

Leonard Levy's concept of the Constitution appears quite sympathetic with Karst's. Levy posits that "[t]he Constitution is basically a political document," Levy, *Introduction — The Making of the Constitution, 1776-1789,* in ESSAYS ON THE MAKING OF THE CONSTITUTION xxxvi (L. Levy ed. 2d ed. 1987) [hereinafter ESSAYS], with a longevity and vitality that derive "from the fact that it incorporates and symbolizes the political values of a free people." Levy, *Introduction,* in AMERICAN CONSTITUTIONAL LAW: HISTORICAL ESSAYS 4 (L. Levy ed. 1966) [hereinafter CONSTITUTIONAL LAW]. The Bill of Rights, in Levy's estimation, embodies

> a new system of public morality based on the premise that government is but an instrument of man, its sovereignty held in subordination to his rights. As amended, the Constitution became a permanent reminder of its framers' view that the citizen is the master of his government, not its subject.

Levy, *Bill of Rights,* in ESSAYS, at 306. Also, similarly to Karst, Levy regards constitutional law as the product of judicial evolution: "In large measure, we have an unwritten constitution whose history is the history of judicial review." Levy, *Introduction,* in CONSTITUTIONAL LAW, at 3. *See generally* Collins, *The Historian as Judge* (Book Review), 15 REVIEWS AM. HIST. 191 (1987) (reviewing L. LEVY, CONSTITUTIONAL CHOICES (1985)).

28. Given their understanding of the Constitution, it should be expected that Professors Levy and Karst favor a constitutional study which emphasizes the historical relationships of sociopolitical practices to the Constitution's protection of certain substantive values. Karst offers an instructive example in his examination of the evolving "freedom of intimate association." Growing judicial recognition of the values that inhere in intimate associations, he argues, is closely related to two egalitarian trends in recent American history: the crusade for racial equality and the feminist movement have accelerated an awareness of cultural diversity and an acceptance of variations in social roles, which have contributed in turn to the values at stake in intimate associations — self-definition, commitment and self-realization. Karst, *The Freedom of Intimate Association,* 89 YALE L.J. 624, 626, 659-63 (1980). Accordingly, in his *Encyclopedia* entry on the subject, Karst carefully explains the substantive values implicit in intimate associations, and the historical gestation of society's tolerance for diverse associations that implicate these values. Karst, *Freedom of Intimate Association,* vol. 2, p. 782.

This emphasis on acute insight into socioeconomic developments that reveal and nurture values over time is evident, as well, in Levy's definitive scholarship on the freedom of the press, see L. LEVY, EMERGENCE OF A FREE PRESS (1985), and on criminal procedural rights, see L. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION (1968); L. LEVY, AGAINST THE LAW: THE NIXON COURT AND CRIMINAL JUSTICE (1974). As with Karst, this understanding of constitutional law study is conspicuous throughout Levy's articles in the *Encyclopedia.* His pieces, *Marbury v. Madison,* vol. 3, p. 1199, and *Exclusionary Rule,* vol. 2, p. 662, are fine examples of Levy's portrayal of the constitutional culture: The meaning of a substantive value, or the significance of a constitutional moment, is demonstrated by way of its relevant sociopolitical context, its historical treatment, and its ideological trappings.

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in our day. By registering differences of opinion among its contributors as to the evolution of doctrine and theory, it may establish the degree of consensus or controversy that attended these changes.

Isn't it interesting to view the *Encyclopedia* metaphorically as a record of the continuing constitutional convention in the twentieth century, and Professors Levy, Karst, and Mahoney as the Madisons of our day? For, similar to the celebrated scribe of the proceedings of the 1787 Convention who noted the intentions of a number of the original framers, the editors of the *Encyclopedia* have collected the understandings of primary figures — jurists and constitutional scholars — among our contemporary "reconstituters." Moreover, the many constitutional law authorities who did not participate in the record-building project as contributors of articles stand in a parallel position to the "silent" framers and ratifiers of the 1787 Constitution. In addition, the contributors leave to future generations the task of discerning the collective purposes and perceptions of the constitutional "founders" of this era.

However farfetched the metaphor may appear at first glance, upon reflection it is useful for at least two reasons. First, it highlights the difficulties inherent in the originalist project for constitutional interpretation.[29] Whatever historical perspective may be gleaned by the twenty-first century readers of the *Encyclopedia,* if its contributors have not been able to speak beyond their times, their portrayal of the twentieth century's vision of the Constitution will be considered obsolete. Yet, to the extent that they have been successful in avoiding obsolescence, the contributors are likely to have focused on doctrinal and theoretical concepts at a level of abstraction that obscures controversy in application.[30] Furthermore, given the clear evidence of conflicting viewpoints on critical constitutional issues, the future user of the *Encyclopedia* will find it difficult to distill a common understanding from among its contributors alone, much less from the "silent reconstituters" among the many influential jurists, lawmakers, and scholars whose opinions have not been recorded. Thus, the *Encyclopedia* unmasks the myth in the originalists' argument that there is any determi-

29. Interpretation of constitutional provisions according to the "framers' intent," once the terrain for esoteric and "principled" discussion among constitutional scholars, has become the ground for political debate since Attorney General Edwin Meese has fired the cannons of "strict construction" and "original intent" in his various broadsides against the liberal constitutional agenda. For accounts of the recent use of the originalist project in the Reagan administration, see L. CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 115-34, 302-05 (1987); and Collins & Skover, *supra* note 21. Informative summaries of arguments against originalism are found in M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 21-69 (1988); Dworkin, *The Forum of Principle,* 56 N.Y.U. L. REV. 469, 493-97 (1981); Schlag, *Framers Intent: The Illegitimate Uses of History,* 8 U. PUGET SOUND L. REV. 283 (1985). An analysis of the 1787 framers' theory of interpretation is given in Powell, *The Original Understanding of Original Intent,* 98 HARV. L. REV. 885 (1985).

30. *See* note 19 *supra.*

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native starting point for constitutional analysis.[31]

Second, the metaphor should caution both today's and tomorrow's readers of the *Encyclopedia* against too formalistic a use of its contents. Although it is an archive of much information and opinion, the *Encyclopedia* cannot be regarded as the quintessence of all that is known and knowable on the Constitution, for the record of the continuing constitutional convention ultimately will not be closed. Unlike the major encyclopedias of a much earlier legal era,[32] the *Encyclopedia* is a testament to the interdisciplinary dynamism of constitutional law which does not have static meaning.[33]

In concluding their prefatory comments, the editors acknowledge that their *Encyclopedia* reveals the Constitution that has been and is, but only guides the Constitution that will be. "After all," they write, "when the American Constitution's tricentennial is celebrated in 2087,

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31. *See generally* Schlag, *Cannibal Moves: The Metamorphoses of the Legal Distinction,* 40 STAN. L. REV. 929 (1988).

32. The "formalist" or "conceptualist" period in American legal history, characterized by the predominant belief that law is a formal science with a unitary set of rules which might be interpreted by lawyers and enforced by judges to resolve all possible controversies, culminated in the publication of the major general reference encyclopedias for legal doctrine that still exist — *Corpus Juris* and *Corpus Juris Secundum, American Jurisprudence,* and the restatements — as well as the first multi-volume legal treatises to present encyclopedic treatments of specialized subjects, including such prominent examples as *Wigmore on Evidence* and *Williston, The Law of Contracts.* Quite naturally, these encyclopedic enterprises provided fuel for the cynical fire of the Legal Realists, who denigrated these works, particularly the restatements, as the progeny of a misguided Langdellian faith in the doctrinal rule of law. For general descriptions of the period of American legal conceptualism, and the rise of the general reference encyclopedias and specialized treatises, see G. GILMORE, THE AGES OF AMERICAN LAW 41-67 (1977) (dating the formalist era, labelled "The Age of Faith," from the late 1860s to the advent of Legal Realism in the late 1920s and 1930s); L. FRIEDMAN, A HISTORY OF AMERICAN LAW 381-84, 400-03, 612-32 (2d ed. 1985); J. JOHNSON, AMERICAN LEGAL CULTURE, 1908-1940, at 17-24 (1981); and L. KALMAN, LEGAL REALISM AT YALE, 1927-1960, at 3-14, 45-49 (1986).

A worthwhile overview of constitutional scholarship in the late nineteenth century is given in Belz, *The Constitution in the Gilded Age: The Beginnings of Constitutional Realism in American Scholarship,* 13 AM. J. LEGAL HIST. 110 (1969). A general account of the reactions of the Legal Realists to the formalist encyclopedic projects is given in G. GILMORE, *supra,* at 87-91; accounts of the Realist assault on the restatements are given in L. KALMAN, *supra,* at 25-28; J. JOHNSON, *supra,* at 54-55, 61, 67-68; J. SELIGMAN, THE HIGH CITADEL: THE INFLUENCE OF THE HARVARD LAW SCHOOL 46 (1978). For some of the most vituperative attacks by Legal Realists on the excessive conceptualism in the restatements, *see* Arnold, *The Restatement of the Law of Trusts,* 31 COLUM. L. REV. 800, 814 (1931); Cohen, *Transcendental Nonsense and the Functional Approach,* 35 COLUM. L. REV. 809, 833 (1935); and Yntema, *The Restatement of the Law of Conflict of Laws,* 36 COLUM. L. REV. 183, 192 (1936). General treatments of the Legal Realist movement and several of its leading authorities are provided in Rumble, *Legal Realism,* vol. 3, p. 1133; Rumble, *Sociological Jurisprudence,* vol. 4, p. 1705; Rumble, *Roscoe Pound,* vol. 3, p. 1431; White, *Oliver Wendell Holmes,* vol. 2, p. 920; Glennon, *Jerome N. Frank,* vol. 2, p. 763; and Parrish, *Felix Frankfurter,* vol. 2, p. 764.

33. In light of this metaphorical account of the *Encyclopedia* as the record of the contemporary constitutional convention, it may be surprising that the *Encyclopedia* contains no specific article on "framers' intent" or "originalism," although there may be traces of the approach in some entries. *See, e.g.,* Berger, *Impeachment,* vol. 2, p. 957; Mendelson, *Contract Clause,* vol. 2, p. 493. Or, perhaps it is largely consistent with the spirit of the metaphor that the *Encyclopedia* place no intellectual boundaries on the meaning of "original intent," even as currently understood.

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what the Constitution has become will depend less on the views of specialists than on the beliefs and behavior of the nation's citizens" (vol. 1, pp. x-xi). By the editors' apparent design, then, the *Encyclopedia of the American Constitution* is a scholarly venture fitting for our century and the next. It describes many of the elements that constitute our national ideology in the present; and, by awakening or reshaping our awareness of those elements, stimulates the potential for reconstituting our ideology in the future. Both in what it says, and in its very act of saying it, the *Encyclopedia* reflects the political and sociological character of its celebrated subject.

For the twentieth century, the *Encyclopedia* is a living account of our living Constitution. For the next century, the *Encyclopedia* is almost certain to be the best surviving account of "the original intent" of those who reconstituted our supreme law.

## APPENDIX

### *Structure and Organization of the* Encyclopedia

The beginning of volume 1 presents an alphabetical list of all articles by subject name, each entry accompanied by identification of its author. The list of articles is followed by an alphabetical list of all contributors; after each name, the contributor's vocational title and affiliation, and an inventory of all entries written by the contributor, are given.

Volume 4 contains the indices and appendices. A subject index and a name index list all pages on which the reader may find references to the subject or the person identified; within each list of pages, numbers printed in boldface type refer to the main article written on the subject or person. A case index, providing an alphabetical listing of all judicial decisions mentioned in the *Encyclopedia,* the pages on which the references can be found, and case citations to the full opinions in the American federal and state and the British reporter systems, will prove extremely useful to readers of the law. For the novice, a glossary offers definitions of legal terms, and indicates which terms of art are the subjects of separate entries in the *Encyclopedia.*

The appendices in volume 4 include, in the order of presentation: (1) the resolution of Congress, dated February 21, 1787, calling for a Federal Constitutional Convention; (2) a copy of the Articles of Confederation; (3) a copy of the 1787 Constitution and its subsequent amendments; (4) the resolution of the Constitutional Convention, dated September 17, 1787, transmitting the proposed Constitution to Congress; (5) the letter of transmittal by George Washington, as President of Congress, accompanying the submission of the Constitution to Congress; (6) a chronology of important dates in the "Birth of the Constitution;" and, finally, (7) a chronology of important events in the "Development of American Constitutional Law."

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# QUESTIONING BROADCAST REGULATION

*Jonathan Weinberg**

SEVEN DIRTY WORDS AND SIX OTHER STORIES: CONTROLLING THE CONTENT OF PRINT AND BROADCAST. By *Matthew L. Spitzer.* New Haven: Yale University Press. 1986. Pp. xii, 163. $15.

Matthew Spitzer has written an ambitious and unusual book, intended to answer the question whether it is right for our society to "regulat[e] broadcasting more intrusively than print" (p. xi). The book is unusual not because of the question it addresses, which has become commonplace in the communications law field,[1] but because of the roads Spitzer travels in answering it. In part 1 of the book, *Economic Rationales for Treating the Media Differently,* Spitzer draws upon the work of such law and economics movement luminaries as Ronald Coase[2] and Bruce Owen[3] to conclude that ultimately there is no justification for government regulation of broadcast content. The right to broadcast, Spitzer argues, could efficiently be allocated by a market rather than by an administrative mechanism, and nothing in the resulting industry structure would demand the sort of content regulation in place today. In part 2 of the book, *Rationales about Effects on Viewers,* Spitzer examines a variety of studies contained in the psychological literature relating to the effects on viewers of various categories of video programming. There, too, he finds no justification for existing broadcast regulation.

Spitzer's decision to draw on economic and psychological scholarship in evaluating broadcast regulation is tantalizing. Spitzer, however, does not in fact use those disciplines to evaluate broadcasting regulation in any broad sense. With rare exceptions, he does not ask whether particular approaches to regulating broadcasting are good policy or bad. Rather, he asks only whether those approaches for broadcasting are different from those in place for print, and, if so, whether the differences can be justified with reference to differences between the print and broadcasting media themselves. Thus, for example, because we regulate print through a market mechanism,

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1. *See, e.g.,* D. GINSBURG, REGULATION OF BROADCASTING 46-74 (1979).

2. *See* Coase, *The Federal Communications Commission,* 2 J.L. & ECON. 1 (1959).

3. *See* B. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION (1975); *see also* B. OWEN, J. BEEBE & W. MANNING, JR., TELEVISION ECONOMICS (1974).



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Spitzer addresses himself to whether any differences between broadcast and print justify our failure to regulate broadcast through a similar mechanism. In marshalling his arguments that we *could* regulate broadcasting through a market mechanism, just as we do print, he declines to ask other questions: Would this be the best regulatory system we could put in place? Is there anything good about existing broadcast regulation, and why is it there? What goals should we be trying to pursue?

Spitzer also declines to ask other questions. He does not ask, for example, whether content regulation can be justified under our *current* system for allocating the right to broadcast. If we do allocate the right to broadcast by means of an administrative agency, does that fact justify or require content regulation, or are the two issues wholly separate? Spitzer considers the matter irrelevant to his analysis.[4]

These gaps seem to stem from Spitzer's determination to construct a line of argument that, if all its links hold, will get him to his desired result; he seems more intent on doing that than on exploring the issues he meets along the way. He ducks a number of interesting questions through his approach to burden of proof, which he places on the opponents of his position.[5] For example, after Spitzer presents a speculative plan for allocating broadcast rights through the market, he indicates that he is entitled to assume that "the details . . . can be worked out . . . until someone produces convincing data or theories" to the contrary (p. 26). Spitzer rejects localism — the notion that we should encourage broadcast outlets oriented towards local areas — as a legitimate concern for broadcast regulators, on the ground that its proponents have not presented empirical data demonstrating, for example, that broadcast coverage of local political news has positive effects on voting (p. 41). He states that he can discount the argument that a ban on violence, pornography, or profanity in broadcast would benefit society more than a similar ban in print, because nobody has provided "specific data" showing that it would (p. 129).

I found Spitzer's approach disappointing, because the research he cites relates directly to a question I would have preferred to see him address. Our regulation of the mass media is rooted in a basic set of beliefs about the role of communication and media in our society. We believe in a marketplace of ideas in which all members of society have the opportunity to speak and convince others of the truthfulness of their views; we believe that in that marketplace we engage in discourse

4. P. 26. Spitzer does at one point suggest that administrative allocation of the right to broadcast imports political distortion into the licensing process, and thus threatens a pernicious form of content control, but he does not elaborate. Pp. 63-64.

5. Late in the book, Spitzer does explicitly address the question of burden of proof, and recognizes that its placement may determine the answers to the questions he raises in those discussions. Pp. 93-94, 113-14. He does not seem to recognize, however, the relevance of the same point elsewhere in his book.

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that is essentially rational. Yet the analysis Spitzer undertakes throughout the book helps to demonstrate, if only incidentally, that most of these beliefs are part of a myth structure that corresponds only incompletely to reality. Spitzer declines to ask what implications this has for our regulation of mass communication. Indeed, under his analysis, the only relevant question is whether the myth structure fails in the same way for print and broadcast media.

In this review I will focus in large part on the first section of Spitzer's book, which contains his economic analysis and was previously published as *Controlling the Content of Print and Broadcast.*[6] I will do so not because I think the psychological issues Spitzer addresses in the latter portion of his book are unimportant, but because Spitzer himself has rather less to say about them. For the most part, Spitzer's second section is devoted not to analytical material but to his summary of a number of psychological studies; he sums up their cumulative impact with the conclusion "not proved." While that conclusion is open to some criticism, I think that the first part contains the more interesting analysis and is more usefully treated at length here.

## I

As Spitzer points out, there is no automatic reason why the right to broadcast must be parceled out by an administrative agency using the licensing model. Many rights in our society, after all, are not allocated that way. Instead, we use a property rights model. Under that set of rules, the rights to use and control a thing are bundled up into the concept of "ownership"; the "owner" has fairly absolute control in the first instance over the rights to use a thing, but can distribute them to others through a system based on private agreements. Those rules by now have become fairly complicated, as a glance at the Uniform Commercial Code or any state's probate law demonstrates.

We use a property rights model to regulate the right to speak via the printed word. I do not have the absolute right to write my thoughts on a piece of paper, photocopy the paper, and distribute it to others; I must first own the paper and photocopier, or have permission from their owner(s) to use them. If I go around writing on paper that belongs to others, or otherwise using communications resources that are owned by others, I can be arrested or sued. These are not trivial points. Rather, the system created by property rights regulation is one under which freedom of the press may be available only to those who own one.[7] On the other hand, this market-based approach is our sole

6. Spitzer, *Controlling the Content of Print and Broadcast,* 58 S. CAL. L. REV. 1349 (1985).

7. I heard this maxim long ago, with no attribution; Sanford Levinson, in a recent book review, attributes a similarly worded thought to A.J. Liebling. *See* Levinson, *Regulating Campaign Activity: The New Road to Contradiction?,* 83 MICH. L. REV. 939, 946 (1985).

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important mode of regulation of the right to communicate via print; we have, for example, established no rules for parceling out that right by way of an administrative mechanism.

We could use an administrative mechanism to distribute the right to speak via the printed word. This might involve the establishment of a Federal Paper Commission, with the duty of allocating among the citizenry the right to communicate in print. As Spitzer poses the notion, paper is to the written word what broadcast spectrum is to the electronic word: The Federal Paper Commission might use the mode of distributing equal amounts of paper to all American citizens, or perhaps of evaluating the messages that Americans wished to write and distributing the most paper to the applicants with the most worthy messages.

Similarly, we could change the rules we now use for regulating broadcast communication. We now distribute the right to broadcast, that is, to use broadcast spectrum, through an administrative mechanism. The Federal Communications Commission allocates the right to broadcast by distributing revocable licenses to do so. It decides who should get the licenses, and whether they should keep them, by making case-by-case public interest determinations.[8] We could, at least in theory, allocate broadcast spectrum through a property rights mechanism instead. We could, as Spitzer explains, "establish[ ] a system of private property in spectrum, creating in effect 'deeds' to certain frequencies during certain periods of time and at certain field strengths. Such deeds would . . . confer[ ] the right to exclude others and would . . . rel[y] on tort, contract, and criminal laws for enforcement" (p. 3). Spitzer devotes chapter 1 of his book to proving that such a system would serve the goal of economic efficiency at least as well as the one we now have in place.[9]

The aspect of Spitzer's analysis deserving most immediate comment is his choice of the criteria a regulatory system should satisfy. Spitzer begins with the notion that various arguments for the current regulatory system "depend, in one way or another, upon the norm of economic efficiency — the value of producing and distributing the mix of goods and services that consumers desire" (p. 9). He attributes to *Red Lion Broadcasting Co. v. FCC*,[10] the foundational Supreme Court decision regarding government regulation of broadcast content, the

8. Our current system, of course, has property rights aspects; licenses once awarded can be bought and sold. Not all countries utilizing an administrative mechanism incorporate this feature. In Japan, for example, broadcast licenses are essentially inalienable. Our system is nonetheless quite different from a true property rights system; *see* text following note 15 *infra*.

9. Spitzer does not address the question of how we might put such a system in place in the first instance. As for that question, see, for example, De Vany, Eckert, Meyers, O'Hara & Scott, *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study*, 21 STAN. L. REV. 1499 (1969).

10. 395 U.S. 367 (1969).

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notion that "economic efficiency requires that the government own all the spectrum rights" (p. 7). This is a surprising formulation. *Red Lion,* after all, never mentions efficiency as such; it was decided before reference by legal scholars to economic efficiency became fashionable. The opinion in *Red Lion* seems to me to rest most firmly on the notion that if we allocated and regulated the right to broadcast in a manner that gave broadcasters rights analogous to those of frequency "owners," then the nature of the technology involved would limit access to the means of broadcast communication to a few persons or corporations; and that *non*economic, first amendment considerations make such a choice unacceptable. Spitzer clearly understands this argument. He recasts *Red Lion* as primarily concerned with efficiency, however, because he takes it for granted that efficiency should be our first goal in structuring a system of media regulation.[11] Spitzer sees no need to justify his use of the efficiency criterion, and seems insensitive to arguments that might be made against it. He rejects the notion that broadcast scarcity might impede efficient distribution through a market system, pointing out that we commonly "distribute much that is . . . scarce — diamonds, gold, silver, rare paintings, and so forth" efficiently through the market (p. 12). This formulation calls forth its own attack. The key to the economic efficiency norm is that goods are distributed to those willing to pay the most for them. Spitzer gives little attention to the question of whether that norm *should* govern distribution of rights to communicate, as it does distribution of diamonds and gold. We do not, for example, distribute the right to vote according to an efficiency-oriented mechanism. If we did, poll taxes would be required, rather than constitutionally impermissible.[12] Indeed, the most efficient system might well auction the right to vote to those willing to pay the most. The current system, by contrast, is highly inefficient: The vote is given to many for whom it is valueless, while those who would be willing to pay a great deal for the right to cast multiple votes are denied the opportunity to do so. Spitzer ignores the possibility that we might want to structure the right to communicate more like the voting right to which it is related, and less like the right to own diamonds and fine art.

Spitzer's thinking in this regard sometimes seems to reflect the notion that we should prefer regulation through a property rights model because it is not really government regulation at all. This has intuitive appeal; we are all used to the traditional law school curriculum's clas-

11. For another analysis of broadcast regulation that places heavy weight on economic efficiency, see S. BESEN, T. KRATTENMAKER, A. METZGER & J. WOODBURY, MISREGULATING TELEVISION: NETWORK DOMINANCE AND THE FCC (1984) [hereinafter S. BESEN]. Besen, Krattenmaker, Metzger, and Woodbury attempt at the outset to consider the goals of broadcast regulation, and list goals other than efficiency that they feel such regulation should achieve. *See id.* at 21-30.

12. *See* Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

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sification of legal doctrine into public administrative law, the domain of government regulation, and private contracts and property law, the domain of purely private ordering. Yet it is misleading to think that the modes of social ordering that have come down to us from the British common law are so natural that they are not really regulation. Allocation through an administrative mechanism and allocation through a property based market mechanism are simply different forms of social ordering.[13] Each requires a governmental hand to make it go. Regulation through a property rights model would not work if the government had not promulgated substantive rules allocating rights among owners, and had not established a mechanism to adjudicate those rights. Spitzer thus does not pose a choice between regulation and nonregulation; the only choice he presents is in the modes of regulation we put in place.[14]

Spitzer's own answer to all this presumably would be that we have already made a choice to structure the right to communicate in print by means of a market mechanism and that the goal of his book is simply to determine whether differences between print and broadcast themselves justify a different approach to the right to communicate electronically. The answer, though, seems both unsatisfying and insufficient. It avoids the deeper questions that we might ask as to how to structure our mass media regulation. And to the extent that Spitzer sets aside, as outside the scope of the book, any profound inquiry into what our goals should be in regulating the mass media, whether through administrative or market mechanisms, he disserves even the narrow goal of comparing print and broadcast. He misses the chance for a more nuanced discussion of whether the same regulatory forms in print and broadcast would indeed serve those goals equally well.

## II

Spitzer's analysis of how a market-based system for broadcast allo-

13. This point is especially patent where, as here, it requires a certain degree of imagination for the law giver to find and define "property" around which the rights derived from the property rights model can be structured.

14. We could, of course, abstain from regulating broadcasting at all. The closest we have ever come to that position was in 1926-1927, after a court held that while the Secretary of Commerce was obligated to grant a license to each radio license applicant, and had the power to assign each to a frequency, he had no power to enforce that assignment if the licensee chose to ignore it. *See* United States v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926); *see also* 35 Op. Atty. Gen. 126 (1926) (regulatory powers of the Secretary of Commerce limited to designating normal wave lengths and fixing the times during which stations may operate). This ruling led to rampant interference, chaos in the radio industry, and the Radio Act of 1927. *See* Natl. Broadcasting Co. v. United States, 319 U.S. 190, 213 (1943); *see generally* I. POOL, TECHNOLOGIES OF FREEDOM 112-16 (1983). In contrast, Italy's television industry survived quite nicely — and by some measures flourished — after a court decision struck down regulation of TV broadcasting. *See* Sassoon, *Italy: The Advent of Private Broadcasting,* in THE POLITICS OF BROADCASTING (R. Kuhn ed. 1985). That country is only today moving towards reregulation. *See* Wilson, *Italian TV's Bare Market,* Washington Post, Jan. 23, 1988, at G3, col. 1.

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cation might work nonetheless merits careful study. Its relevance for Spitzer lies in the following syllogism: Many arguments supporting government regulation of broadcast content flow from the asserted scarcity of broadcast spectrum, or otherwise from the economic structure of the broadcast industry. If, however, the scarcity of broadcast spectrum (to the extent that it exists) and the current industry structure are in fact the *results* of our decision to leave the right to broadcast in the hands of an administrative agency, then we can sweep away much of current thinking regarding the need for regulation of content.

In talking about a system in which the market allocates the right to broadcast, Spitzer has in mind not merely a system in which broadcast licenses can be bought and sold with minimal governmental oversight. Indeed, as Spitzer points out, we have such a system in place now. The Federal Communication Commission's (FCC) dismantling in recent years of its "anti-trafficking" rules, which restricted resale of broadcast licenses, has largely ended FCC oversight of the process by which those licenses are bought and sold.[15] Nor is Spitzer merely arguing for a system in which the FCC allocates licenses in the first instance on a nondiscretionary basis. Rather, he argues that the market could determine *all* issues involved in broadcast allocation: the use (*e.g.,* radio broadcast or microwave data transmission) each broadcaster could engage in, the bandwidth and power it could use, the times of day it could broadcast, and so on.

Spitzer recognizes the complexities involved in such an enterprise. He notes that the job of getting each chunk of bandwidth to an appropriate user in a manner that minimizes interference and thus maximizes value is made harder where there are many parties involved. The costs of simultaneous negotiation among all of the various parties may be high, and some parties may be tempted to hold out for too-high shares of the wealth created or to seek a free ride on the payments of others.[16] We do not leave the analogous (although more simple) job of allocating land among heavy industrial, light industrial, commercial, and residential uses to the market; rather, the institution of zoning recognizes that that task is better handled by an administrative

15. FCC "anti-trafficking rules" until recently barred station transfers, absent extenuating circumstances, if the licensee had held the station for less than three years. The Commission in 1982, however, decided that "the public interest could best be served through elimination of the three year rule and its underlying 'trafficking' policy." *Amendment of Section 73.3597,* 99 F.C.C.2d 971, 972 (1985). Under current FCC rules, Commission scrutiny of any sort of broadcast license transfer is triggered only if the station has been operated by the current licensee for less than a year *and* the current license was awarded after a comparative hearing or by means of a minority ownership preference. *See* 47 C.F.R. § 73.3597 (1987).

16. Spitzer dismisses "the question of whether disputes between many parties might produce litigation costs that exceed the cost of running an administrative agency" (p. 21) by means of a device by this point familiar to his readers; he puts the burden on those who believe that a market system would impose unacceptable transaction costs to offer "convincing data or theoretical arguments" to that effect. P. 22.

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body. Spitzer is somewhat grudging about the need for zoning of the broadcast spectrum, noting that spectrum planners could err and that one American city (Houston) has managed to survive without land-use zoning. He does, however, ultimately concede that governmental zoning might be necessary to help allocate broadcast spectrum.

Nor is this the only governmental mechanism that we might need. There are other areas, Spitzer points out, in which "the market may need assistance" (p. 24). Where changing demand or technology calls for the reallocation of a large number of spectrum rights to different uses — for example, where efficiency calls for transmitting Direct Broadcast Satellite programming,[17] requiring a great deal of bandwidth, over frequencies previously occupied by a large number of broadcasters each using only narrow bandwidth — the chances of bargaining breakdown may be extreme. As for this problem, Spitzer suggests that the government might use eminent domain to force holders of broadcast rights to sell to the more efficient purchaser.[18] Spitzer, I think, neglects the difficulties that systematic use of eminent domain would entail.[19] In the land-use context, after all, eminent domain is only rarely used to benefit private construction, and government decisionmakers use the political process — and political criteria — to decide when it should be exercised. Spitzer would presumably find that mechanism unacceptable in the context of allocating broadcast spectrum. An administrative mechanism would have to be established to implement eminent domain; eminent domain by its nature requires a government body to exercise it, and at least traditionally the government sets initial valuations of the condemned property.[20]

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17. *See* text accompanying note 21 *infra.*

18. Spitzer also suggests another function for eminent domain; it could be used to assemble broadcast spectrum for functions such as the citizens' band. Indeed, although Spitzer doesn't discuss the point, the same mechanism would be equally applicable to the task of assembling spectrum for any governmental use; governmental uses today take up about half of the available broadcast spectrum. *See generally* Metzger & Burrus, *Radio Frequency Allocation in the Public Interest: Federal Government and Civilian Use,* 4 DUQ. L. REV. 1 (1966). Under Spitzer's plan, the government presumably would have to assemble spectrum for these uses either by eminent domain or by ordinary purchase. This, however, poses no problems for Spitzer's theory: The efficiency norm requires that the government pay for the resources it uses just like any other user. *See* Coase, *The Interdepartment Radio Advisory Committee,* 5 J.L. & ECON. 17 (1962).

19. He states that "[s]uch a taking of spectrum rights would promote efficient spectrum utilization in the presence of a market failure and would almost certainly be a 'public use' as required by the fifth amendment." P. 24. The constitutionality of this solution, however, seems to me less assured than Spitzer supposes. It is supported by eminent domain cases dealing with slum clearance, in particular the leading case of Berman v. Parker, 348 U.S. 26, 33-34 (1954). The various courts, however, have found invocation of eminent domain for the use of private parties a difficult and contentious issue. *See* R. NEELY, HOW COURTS GOVERN AMERICA 132-36 (1981). *Compare* Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 632-33, 304 N.W.2d 455, 458-59 (1981), *with Poletown,* 410 Mich. at 636-45, 304 N.W.2d at 461-64 (Fitzgerald, J., dissenting), *and Poletown,* 410 Mich. at 662-81, 304 N.W.2d at 472-80 (Ryan, J., dissenting).

20. *See* 6 J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 25.5 (P. Rohan recomp. rev. 3d ed. 1969).

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In an attempt to avoid a discretionary government role, Spitzer suggests that eminent domain might be made available to anyone offering ten to twenty percent above the fair market value of the property sought to be condemned. The opportunities for legal manipulation of such a system, in which all rides on appraisal and valuation, though, seem tremendous. Further, the notion that *any* broadcast spectrum rights would be subject to automatic forced sale to any buyer willing to pay a premium over what its lawyer convinced a court was fair market value, is both frightening and far from the market ideal. Spitzer's answer that ex-broadcasters dispossessed of their frequency rights would be free to purchase the right to broadcast on other frequencies is, I think, not an adequate solution. Banishing a speaker from the broadcast dial until it can, perhaps, hire the lawyers and sink its premium into ousting some other speaker at some other location imposes more than mere inconvenience on the bought-out party, and invites abuse in an area of sensitive first amendment concerns.

I will not spend a great deal of time on this question, since it is always easy to pick on isolated points in an author's presentation. Spitzer himself appears to recognize that his discussion does not solve all problems; he feels, however, that he has done enough so that the burden is shifted onto others to produce "convincing data or theories" showing the unworkability of his approach (p. 26). The problem, though, emphasizes the tenuous nature of Spitzer's carefully posed line of argument. If Spitzer's eminent domain point falls, then his contention that we can use a market mechanism to allocate the right to broadcast may fall with it; and if that falls, then Spitzer's entire argument regarding the lack of economic justification for broadcast content regulation unravels.

## III

Once we imagine government mechanisms for spectrum allocation such as eminent domain and zoning, it is not clear how much of a role is left for the market to play. It may be that a system characterized by these institutions would not be radically different from the one we have now, although license renewals would be unnecessary, licenses would be even more freely alienable than they are now, and the government would pay rather less attention than it does now to what licensees do with the bandwidth they are allocated. Assuming, however, that we could institute a system under which frequency uses were substantially less restrained by administrative decisionmaking than they are today, what sort of industry structure might result? Spitzer speculates that the resulting system would be quite different from the one we now have.

As Spitzer sees it, television freed from its existing legal and insti-

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tutional constraints probably would be transmitted regionally over Direct Broadcast Satellites (DBS). In a DBS system, video (or other) signals are beamed up from "earth stations" and bounced off satellite transponders directly to individual roofs and backyards. A properly positioned satellite can cast a signal over the entire continental United States.[21] Spitzer argues that, on a cost-per-viewer basis, DBS provides easily the cheapest mode for video transmission.[22]

Faced with competition from more efficient DBS transmission, Spitzer reasons, most conventional over-the-air TV broadcasters would not survive. In each metropolitan area there might be one or two conventional stations offering local news, weather, and sports, and perhaps operating as broadcasters only during peak hours. Cable television might survive playing a similar role on an even more local scale. Most television signals, further, whether distributed via DBS or conventional broadcast stations, would be available only by subscription (that is, on a pay basis). Many of those stations would offer advertising as well.

What would be the consequences of such an industry structure for choosing the proper mode of regulation? For Spitzer, the striking thing about such a structure is its similarity to that which today characterizes the print media. Like print, broadcast uses valuable resources that are "scarce" in the economist's sense of the term: There is a finite amount of resource available, and if you set its price at zero, then demand will exceed supply. Like print, broadcast uses resources whose supply can be increased if we are willing to sink money and effort into the job. Like print, broadcast uses resources that could be efficiently distributed through a market mechanism.

As with print, Spitzer continues, broadcast of entertainment programming (though not news) involves no significant economies of scale in the creation and editing phases, but encounters substantial economies of scale in the transmission phase, leading to natural monopoly unless a common carrier transmission medium is made available.[23] As with print, a broadcast industry freed from administrative

21. *See* L. GROSS, THE NEW TELEVISION TECHNOLOGIES 17 (1983). Spitzer contemplates that DBS satellites will serve as regional broadcasters, covering "entire time zone[s]." Pp. 34-40.

22. Others, as Spitzer concedes, have strongly questioned this conclusion. They argue convincingly that given the cost of the dishes needed to receive DBS signals, a system relying on satellite transmission of video signals to community antennas and cable transmission of the signals to individual residences will almost always be cheaper. *See* Anderson, *The Economic, Legal and Scientific Implications of Direct Broadcast Satellites,* 7 COMM. & L. 3 (1985); Pool, *Technological Advances and the Future of International Broadcasting,* 13 [NHK] STUD. BROADCASTING 17, 26-31 (1977). Indeed, the system described in this footnote is precisely how premium cable television programming such as Home Box Office (HBO) is distributed today.

23. Spitzer at one point speculates that it might in appropriate circumstances be a good idea to require DBS satellites to operate as common carriers, offering transmission to all who are able to pay. Pp. 36-37. As it happens, domestic communications satellites have traditionally been operated on a common carrier basis; a satellite's transponders (its key radio equipment) were typically leased on a first-come, first-served basis, pursuant to "just and reasonable" cost-based

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allocation might develop into a structure in which nationally and regionally oriented media coexist with smaller, local media.[24] Finally, as with print, most media in such a broadcast industry would depend economically on a mix of advertiser and reader/viewer payments, although a few might depend solely on one or the other.

The reader may have difficulty with a number of these characterizations. In general, I find that Spitzer strains too hard to find broadcast and print identical. Thus, for example, Spitzer describes the transmission phases in print and broadcast to be essentially similar. Spitzer points out that in the print media today, the nature of the transmission (that is, delivery) phase helps compartmentalize the market into newspaper, periodical, and book components. In the newspaper sector, speedy newspaper delivery within a metropolitan area is quite close to a natural monopoly, a factor that has contributed to the death of competition among major newspapers in our nation's cities.[25] In the periodical sector, low-cost common carrier transmission through the United States Postal Service has allowed the creation of a lively marketplace of ideas and information populated by some fairly small publishers. And in the book sector, a different transmission mechanism has also yielded favorable results.

Spitzer notes the economies of scale that characterize broadcast transmission, and argues that broadcasting is just like print in that it is characterized by "a naturally monopolistic bottleneck" in the transmission phase; he concludes that therefore "market structures for print and broadcast, absent regulatory shaping, would probably resemble one another considerably" (p. 40). Though I am not trained in economics, the existence of such a bottleneck for broadcast is much less clear to me. The cause of the bottleneck in print lies in the fact that low-cost, large-scale delivery to a large number of homes in a given area is a true natural monopoly; it is inefficient to have more than one entity doing the job.[26] Even if we accept Spitzer's conclu-

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tariffs. *See* 47 U.S.C. §§ 201, 202, 203 (1982). Notwithstanding the common carrier legal scheme, however, because leases were awarded on a long-term basis and satellites were in short supply, transponder service was not in fact available to all who were willing to pay cost-based rates. *See* Wold Communications, Inc. v. FCC, 735 F.2d 1465, 1470 n.8 (D.C. Cir. 1984). In 1982, the FCC authorized domestic satellite owners to offer transponder service on other than a common carrier basis. *Id.* at 1471-73.

24. Spitzer implicitly concedes to his opponents the fact that the current broadcast industry is dominated by local media. While this adequately describes the formal law of broadcast regulation, it seems a curious description at least of television. The vast majority of television programming today, after all, is distributed nationally, either through the over-the-air networks or on cable. Broadcasting is not coming to resemble print by developing overarching national media, as Spitzer states; rather, today's media news is that print is developing national media such as *USA Today* and is thus coming to resemble broadcast.

25. *See generally* P. BENJAMINSON, DEATH IN THE AFTERNOON: AMERICA'S NEWSPAPER GIANTS STRUGGLE FOR SURVIVAL (1984).

26. The point, however, should be approached with caution; in Japan, for example, four mass-oriented, largely politically undifferentiated, national newspapers with circulations in the

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sions about economies of scale in broadcast, however, those economies of scale do not a natural monopoly make. Under existing technology, each transmitting station or satellite can carry only a limited number of signals. The industry therefore demands a fair number of stations or satellites engaging in broadcast transmission; yet I am aware of no particular structural reason why it should be more efficient for one entity to control multiple stations or satellites. The problem, then, is not so much natural monopoly as simple entry barriers caused by the cost of access to transmission facilities. As our experience with domestic communications satellites has shown,[27] common carrier regulation may not significantly lower those barriers. Indeed, if Spitzer is wrong about the role that would be played by DBS, then the role of cable systems, supplying communities with programming that they themselves receive by satellite, may well present a natural monopoly bottleneck; but that would be a problem quite different from any existing in the print media today.[28]

One thing this analysis demonstrates, though, is that it is hard — and pointless — to make comparisons between the two media in a vacuum. In comparing existing print media and hypothetical broadcast, it is necessary to know what one is looking for, and thus what differences between the two industries are relevant. Indeed, print and broadcast are different in at least one obvious respect: one uses paper and the other uses broadcast spectrum. Is that difference relevant in structuring a regulatory system? The answer to that question depends on the criteria one wishes the regulatory system to satisfy.

## IV

Spitzer's answers to the question of what criteria a regulatory system should satisfy are more reassuring on some occasions than on others. His performance is disturbing when he is forced to consider the relevance of one key difference he finds between broadcast and print: that the broadcast entities one would be likely to see in a property rights system would likely be larger than existing newspaper publishers (pp. 40-41). There are a variety of reasons one might consider the sheer size of dominant broadcasters to be a problem. For those concerned today about the media power of large publishers and broadcasters, size is itself a concern. Certainly FCC policy has historically been marked by a desire to limit the geographical reach of media entities so as to limit their media power.[29] For those concerned about ease

millions are distributed in the same service areas through home delivery. *See generally* Y. KIM, JAPANESE JOURNALISTS AND THEIR WORLD 5-8 (1981).

27. *See* note 23 *supra.*

28. As for that question, see Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985), *aff'd.*, 476 U.S. 488 (1986).

29. *See, e.g.*, 47 C.F.R. § 73.3555 (1987).

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of entry into the industry, similarly, the size of its existing members is a key issue.

Spitzer does not address any of these arguments. He implicitly sees regional broadcasters, transmitting signals covering major portions of the country, as presenting no efficiency barrier nor any threat of oligopoly more worrisome than that already existing in the print media. He does mention the argument that the regulatory system should encourage local (*i.e.*, metropolitan area) broadcasters in the interests of fostering a sense of community in the cities the broadcasters serve and educating their populations about local political issues.[30] Largely without analysis, he rejects those arguments as unproved. The burden is on the "proponent of regulation," he states, to demonstrate convincingly that local broadcasting would have positive influences on voting behavior, or that it would better foster a sense of community than regional broadcasting (pp. 40-41). He sees no hard evidence that it would.

Later on, Spitzer more extensively addresses values other than economic efficiency. Relying on a well-known article by Lee Bollinger, he identifies those values as access and diversity.[31] He defines access as "the ability of any individual in a particular market to place his message within the reach of the audience," and diversity as "the heterogeneity of material produced in any given market" (p. 51).

Spitzer's treatment of these issues bypasses some interesting points. Spitzer divorces diversity from the notion that a free battle of differing ideas will aid the search for truth, and ties it instead to economic concerns; diversity, he reasons, serves consumer welfare by making many

30. "Localism" has been a key FCC regulatory goal for some decades. *See, e.g., Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C.2d 393, 395 (1965); *cf.* S. BESEN, *supra* note 11, at 27-29 (discussing and rejecting several possible justifications for a policy favoring local broadcasters).

31. *See* Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media,* 75 MICH. L. REV. 1 (1976). Bollinger in this article suggested that the first amendment might be well served by imposing regulation designed to ensure "access" to either print or broadcast, and leaving the other free from such regulation. Society would thus have the benefit of both a medium marked by safeguards against the arbitrary use of private media power on the one hand, and a medium free from the potentially choking hand of the government regulator on the other. Spitzer rejects Bollinger's argument in part on the ground that it

> skews the distribution of values served in favor of those people who strongly prefer receiving one medium or the other. For example, those who cannot read . . . will be confined to the values of fair but homogenized communication. Conversely, those who live in areas unserved by broadcast may be confined to interesting but biased publications because none are subject to the fairness doctrine. Because millions of people cannot read and many own no television set, these effects are very important.

P. 46 (footnotes omitted). Spitzer notes as well that the current system fails to protect many newspapers from government interference, because the government can exercise leverage over broadcasters that are linked to the newspapers by ties of corporate affiliation. Pp. 50-51. This is certainly true, but it is hardly a telling blow against Bollinger's theory; Bollinger might simply respond that we should therefore ban corporate affiliations between newspapers and broadcasters.

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types of programs available and thus making it more likely that viewers will be able to watch the types of programs they value most. The diversity Spitzer seeks appears to relate to the types of programming produced (such as news, sports, and situation comedies), rather than the range of ideas and values being put forward. Emphasizing consumer welfare, Spitzer implicitly denigrates approaches seeking to advance goods such as, say, improvement in the quality of public discourse, or informed voting, or participation in public affairs, as "castor oil" regulation, imposing what is seen as "good for the people regardless of their pleasure" (p. 52).

Spitzer's inattention to the social policy concerns animating our first amendment norms enables him to leave unexamined some of the predicates of his own argument. Access and diversity are important precisely because they advance first amendment values; indeed, to my mind, the only legitimate justification for any system of communications regulation is that it promotes first amendment values better than do other approaches.[32] Spitzer's analysis takes as a given that our regulation of the print media adequately achieves those values, and thus is an appropriate model for broadcast. Yet thinking about Spitzer's economic analysis helps lead to the conclusion that our first amendment beliefs are incompletely realized even in the print medium. That disparity between the ideal and the actual casts some doubt on his proposals for broadcast.

As Spitzer acknowledges, our society prizes the right to individual self-expression.[33] This might suggest the desirability of working towards a system in which as many people as possible have the option to engage in mass communication on a meaningful level. Our first amendment mythology is premised on the notion that almost everyone does have that option: We are confident that even the most impoverished proponents of unpopular causes have the right and the ability to distribute pamphlets to the masses, and thus ultimately to win acceptance of their ideas.[34] We bottom our thinking about the first amendment, in the print context, on that basis.

Yet this mythology, at best, seems to describe reality incompletely. In the marketplace of ideas, the better-funded voices speak louder than others,[35] and the ability of the average citizen, no matter how commit-

32. *But cf.* CBS v. Democratic Natl. Comm., 412 U.S. 94, 145 (1973) (Stewart, J., concurring) (stressing the dangers we invite "when we lose sight of the First Amendment itself, and march forth in blind pursuit of its 'values' ").

33. Pp. 45-46; *see, e.g.,* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 33 (1941) (first amendment protects "the need of many men to express their opinions on matters vital to them if life is to be worth living").

34. Some of our most elegant rhetoric about the importance of the first amendment was inspired by such hopeless causes. *E.g.,* Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

35. *See, e.g.,* Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?,* 82 COLUM. L. REV. 609 (1982).

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ted, to speak in any but the softest of voices is limited. Furthermore, that problem intuitively seems even more pronounced with regard to broadcast than to print, and Spitzer's proposal, at least superficially, seems designed to accentuate it. The existence of that gap between myth and reality poses an initial question: Is it possible or desirable for a regulatory system to level that playing field?

Another concept stressed in our first amendment jurisprudence is that of the "marketplace of ideas." It is at the core of our jurisprudence that mass communication should provide a forum in which important ideas can be thrashed out, and through which individuals can decide for themselves what is true and right.[36] If we were to take this idea seriously, then ideally we would want our mass media to be a forum where all, or most, important ideas were in fact discussed; we would want a diversity of viewpoints to be presented; and we would want ideas to prevail in that forum on the basis of reasoned argument, not on the basis of some voices simply drowning out others. Our dominant mythology provides that, by and large, all speakers and ideas indeed do have access to the communications marketplace, and that truth does win out in the end.[37] Further, to some extent, the system does work: While their circulation is not high, national magazines do provide a wide range of ideas and argument on a wide variety of issues.

Yet again, the ideals I have set out are in many ways far from our current reality. Scholars have documented the extent to which some ideas are not seriously discussed in our mass society at all,[38] and it is hard to deny the role played, in our consideration of various political questions, by the level of funds available to each side.[39] It is largely in response to the notion that the print model could not engender a proper marketplace of ideas in the broadcast arena that the FCC created "fairness" regulation in the first place.[40] Yet that regulation has

36. Thus Justice Holmes's famous pronouncement in *Abrams v. United States:* "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ." 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 385 (1969). *But see* Central Hudson Gas & Elec. Corp. v. Public Serv. Commn., 447 U.S. 557, 592 (1980) (Rehnquist, J., dissenting):

> [I]dentification of speech that falls within [first amendment] protection is not aided by the metaphorical reference to a "marketplace of ideas." There is no reason for believing that the marketplace of ideas is free from market imperfections any more than there is to believe that the invisible hand will always lead to optimum economic decisions in the commercial market.

37. We have thus, for example, rejected as "wholly foreign to the First Amendment," Buckley v. Valeo, 424 U.S. 1, 49 (1976), the notion that there is any need to restrict corporate power to speak, though that power has been challenged "as seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas." First Natl. Bank v. Bellotti, 435 U.S. 765, 810 (1978) (White, J., dissenting).

38. *See* C. LINDBLOM, POLITICS AND MARKETS 201-13 (1977).

39. *See* Wright, *supra* note 35.

40. For early expressions of Commission views, see *Editorializing by Broadcast Licensees,* 13 F.C.C. 1246 (1949); *In re* United Broadcasting Co., 10 F.C.C. 515 (1945); *In re* The Mayflower Broadcasting Co., 8 F.C.C. 333 (1940); *In re* Young People's Assn. for the Propagation of the

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obvious and serious defects: Not only does it inject governmental content regulation into broadcasting, but forcing people to talk about important issues and ideas, on pain of losing their licenses, seems a flawed method of achieving worthwhile discussion in the first place. These too are questions for the regulatory system: How can we set a system in place under which such "free and open encounter"[41] between opinions can take place?

We often speak of the first amendment as fostering the goal of political self-government. "[A] people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[42] This suggests that, in an ideal system, broadcasters would supply the community with the information it needs to govern itself. Yet that raises a point I have skimmed over in the last few pages: While the print media in large extent do cover news and political issues, television for the most part provides not news and opinion but entertainment, the relevance of which to the pressing issues of the day may be attenuated at best. Indeed, many broadcasters have traditionally provided the little news and public affairs programming that they have only because the FCC, through the fairness doctrine and attention to local programming, required them to do so.[43] How should the regulatory mechanism address this issue?

Finally, we might plausibly state that all persons possess a right to receive mass communication;[44] the Communications Act of 1934 states as its basic goal the provision "to *all* the people of the United States a rapid, efficient, Nation-wide . . . wire and radio communica-

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Gospel, 6 F.C.C. 178 (1938); *see also* Trinity Methodist Church, South v. Federal Radio Commn., 62 F.2d 850 (D.C. Cir. 1932), *cert. denied,* 288 U.S. 599 (1933); *In re* Great Lakes Broadcasting Co., 3 F.R.C. ANN. REP. 32, 33 (1929), *revd. on other grounds,* 37 F.2d 993 (D.C. Cir.), *cert. dismissed,* 281 U.S. 706 (1930).

The FCC held this past August that it would no longer enforce the fairness doctrine; that complex of rules, it held, "contravenes the First Amendment and thereby disserves the public interest." *In re* Syracuse Peace Council, 2 F.C.C. Rcd. 5043, ¶ 98 (Aug. 6, 1987). It is not yet clear as of this writing whether that ruling will stand.

41. J. MILTON, AREOPAGITICA (1644 & photo. reprint 1927).

42. Letter from James Madison to W.T. Barry (Aug. 4, 1822), *quoted in* Note, *The Right to Know in First Amendment Analysis,* 57 TEXAS L. REV. 505, 506 (1979).

The Supreme Court has frequently identified self-government as the central social goal the first amendment serves. *See* First Natl. Bank v. Bellotti, 435 U.S. 765, 771, 776-77 (1978); Buckley v. Valeo, 424 U.S. 1, 14 (1976); Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936). *See generally* New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

43. Regarding the fairness doctrine, see note 40 *supra.* Until a few years ago, informal Commission guidelines strongly encouraged broadcasters to program at least five percent local programming and at least five percent news and public affairs programming between 6 a.m. and midnight. The FCC abandoned those guidelines for radio in 1981, *see Deregulation of Radio,* 87 F.C.C.2d 797 (1981), and for television in 1984, *see Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations,* 98 F.C.C.2d 1076 (1984).

44. *See* Lamont v. Postmaster General, 381 U.S. 301 (1965).

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tion service with adequate facilities at reasonable charges."[45] But in a world characterized by the increasing importance of fast, easy, and cheap distribution of and access to information,[46] the prospect of creating a new class of the information-poor holds open the threat of further stratifying our society. This concern is not addressed by efficiency-oriented analyses of broadcast regulation; on the contrary, the essence of efficiency is that goods and services go to those ultimate consumers willing to pay the most for them. Yet the notion of a regulatory system that would provide an ever greater diversity of speech, at ever increasing prices, only to those listeners able to pay, may raise new threats to our basic beliefs and our basic values. This provides a final problem that no regulatory analysis can fail at least to address: Stephen Carter has warned of a "New First Amendment, with . . . guaranties of freedom of speech for those who can afford it, and freedom to listen for those who cannot."[47] Can we afford a system under which the poorer of us cannot afford even to listen?[48]

## V

The coin of access and diversity may buy almost all of the goods set out above. Indeed, Spitzer would explain, the notion that as many people as possible should have the option to engage in mass communications is but the goal of access renamed; and, he might continue, the marketplace of ideas is just another reflection of the same concept. The most reasonable way to encourage the marketplace of ideas, he might argue, would be to structure our mass media around the initial goal that all speakers with an interest in presenting their views to the public through the mass media have the capability of doing so. Such a system would require a multiplicity of media outlets, and (I would add) would further require that those who control those outlets not have too great an incentive to avoid political issues on the ground that avoidance would attract greater audiences and better please advertisers.[49] But those factors in turn could be assured by achieving wide access to the means of mass communication. If all speakers primarily concerned with conveying political messages (as opposed to those pri-

45. 47 U.S.C. § 151 (1982) (emphasis added).

46. For a little-read perspective on this phenomenon, see Bowes, *Japan's Approach to an Information Society: A Critical Perspective,* 2 KEIO COMM. REV. 39 (1981).

47. Carter, *Technology, Democracy, and the Manipulation of Consent* (Book Review), 93 YALE L.J. 581, 607 (1984).

48. Spitzer questions whether we need to worry about some of these matters. Thus, so far as the goal of political self-government is concerned, he asks, "Do watching television and listening to the radio inform voters? If so, is it in a good way? Do voters alter their voting behavior based on this information? Do they vote more often? Are the changes, if any, good ones?" P. 41. He does not answer the questions he poses, explaining that they are "expressly beyond the scope of this book." *Id.*

49. *See* T. GITLIN, INSIDE PRIME TIME 252-60 (1983).

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marily concerned with commercial success) in fact have access to the means of mass communications, the "marketplace of ideas" is assured.

As for broadcast's role in disseminating political information and ideas, it may be that broadcast is held back by the inherent limitations of the medium: A newspaper can choose to cover public affairs in depth, simply by adding additional pages. A single television signal, on the other hand, can devote additional time to one matter only by taking it away from another. The upshot is that to the extent that any given broadcast signal wishes to capture a large segment of the market, it must ration its programming and offer no more public affairs programming than the average viewer is interested in watching.

Yet here too, access — or at least multiplicity of media outlets — would help provide an answer. Our experience with both radio and cable television suggests that the greater the number of media outlets in a market, the greater the degree to which many of those speakers can and will direct their programming to special or fringe interests, and news and public affairs are a special interest that we can rely on at least a few speakers in such markets to cover fairly extensively. Thus if we achieve ease of access into the media marketplace, the problem of public affairs programming takes care of itself.[50]

And the problem of pricing some listeners out of the market? Here Spitzer's analysis would not provide a solution.[51] Yet if a property rights approach would achieve all of the other goals just discussed, that it falls short of perfection perhaps should not be considered fatal. It is worth moving on, therefore, to the question whether regulation of broadcasting through a property rights system would in fact achieve those goals.

Unfortunately for Spitzer's argument, his conclusion that a property rights system would best foster access and diversity does not follow smoothly from his earlier premises. Spitzer finds that the best source of both diversity of voices and access to the market for fringe speakers is the existence of a large number of media outlets, and concludes: "the crucial issue with respect to access and diversity is whether there are enough broadcasters in the market" (p. 62). Spitzer does not go on, however, to argue for a property rights based system on the ground that such a system would maximize the number of broadcast speakers. He fails to do so presumably because his analysis

50. The argument does not provide an answer to the objection that public affairs programming, competently done, may cost more to produce than its producers can receive in terms of the advertising or pay-TV value of the audiences they attract. For Spitzer, however, that fact would suggest that the programming (since it is not valued by the consumer) is not worth producing in the first place.

51. Some economists might suggest that a problem of this nature is best solved by providing the poor with information subsidies modeled after food stamps (or tuition tax credits). Much public policy today, however, is based on the realization that while such solutions are theoretically pure, that purity as a general matter does not justify the unwieldiness, layers of bureaucracy, and real-world problems they entail.

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of market structure under a property rights system fails to convince him that that would be the case. Spitzer, after all, identifies economies of scale bottlenecks as the system's most prominent feature, and characterizes that system — in the absence of some sort of indistinct common carrier regulation — as dominated by national media giants.

Rather, Spitzer argues, if we take as a given that there are many broadcasters in a market, then because existing FCC rules in fact discourage diversity, a property rights based system will generate greater access and diversity than our existing one. If there are few broadcasters in a market, Spitzer argues, the existing system so badly serves access and diversity that there is no reason to believe that a property rights based system would not do as well. In that situation, a property rights based system should be preferred, since administrative allocation leads broadcasters to censor themselves to avoid offending powerful elected officials (p. 63). In any case, Spitzer argues, if we indeed wish to encourage access and diversity, a better answer is to require broadcasters to act as common carriers in the transmission phase, increasing both access and diversity by offering broadcast time to any speaker willing to pay for it.

Spitzer for the most part fails to support these conclusions. While he discusses a number of specific FCC rules that he states discourage the broadcast of diverse programming, he doesn't seem to argue that the problems he identifies are basic to any system that allocates the right to broadcast through an administrative agency.[52] To the extent that these are merely incidental mistakes marring our current system, they hardly support Spitzer's broader theoretical generalizations. Nor does Spitzer provide support for the view that under our current system, access is so difficult, and so skewed to certain segments of society, that a property rights based system in a concentrated market would do no less well. That may be true; yet there is some reason to believe the opposite.

The lesson of our antitrust laws is that, absent government intrusion, the market works particularly badly where ownership is concentrated and entry barriers are high. The newspaper industry presents a concrete example of that in the media context. Almost all areas of our country are served by newspaper monopolies,[53] with competition existing for the most part only at the very high ends of some markets (the *Wall Street Journal* and *New York Times*), and at the bottom end of the rest (the *National Enquirer* and its competitors).[54] Nor is the

52. Nor, I must confess, do I understand all the points that he makes. Spitzer's argument relating to multiple station affiliation, in particular, eludes me completely.

53. Of the top fifty media markets — those areas of the country most able to support competing daily newspapers — only eleven in fact do so. Packwood, *Let Newspapers be Newspapers*, Washington Post, Feb. 9, 1988, at A23, col. 1.

54. The position of *USA Today* on this scale is open to some discussion.

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quality of any but a very few of these newspapers anything to write home about. Creative antitrust remedies, such as treating newspaper printing plants and distributorships as "essential facilities" to which all competitors must be given access,[55] might have created more competition within the industry (or, alternatively, might have thrown it into chaos). But we did not choose such remedies.

We avoided the print model in broadcast regulation in part because we feared that technical limitation entry barriers in that medium would stifle access.[56] The relative scarcity of broadcast frequencies suggested that the cost of access to those frequencies would be high, and that, even more so than in print, the principle of freedom of the press guaranteed to all who own one would provide an illusory freedom. The system we instituted instead, however, is also flawed from the perspective of access and diversity.[57]

What, then, is the solution? There has been no shortage of commentators pointing out recently that the current system works rather badly.[58] The FCC has demonstrated its own view of the regulation in place just a few years ago by dismantling most of it.[59] And indeed, the government content regulation, potential for political favoritism, and capability to still — rather than encourage — controversy inherent in the current system make it worth considering any practical alternative.

I have no definitive answers to offer here. This is perhaps the luxury of the book reviewer, that one can critique the work of others without supplying all of the answers oneself. Yet it seems to me that if we hope to bring our first amendment mythology and its reality closer together, the road to a workable answer could lie in Spitzer's reference to common carrier regulation. That regulation alone may not prove to be the tool best suited to our needs; Spitzer does not discuss how a common carrier system would work, and there is some reason to believe that it might not.[60] But Spitzer's economic analysis at least sug-

55. *See* Hecht v. Pro-Football, Inc., 570 F.2d 982, 992-93 (D.C. Cir. 1977), *cert. denied,* 436 U.S. 956 (1978).

56. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 376-77, 392 (1969); *see also* note 40 *supra* and accompanying text.

57. The FCC has undertaken some noteworthy initiatives designed to increase access to broadcasting. One such initiative was its focus on low-power television (LPTV) stations. These are television stations broadcasting with very low power and covering service areas roughly forty miles in diameter. The FCC first authorized LPTV in 1980, largely exempting it from regulation and hoping to allocate licenses to groups and individuals, especially minorities, who had not traditionally been part of the broadcasting scene. By 1985, there were about 80 stations on the air in the continental United States. License allocation, however, has been slow, and LPTV's future is unclear. *See* L. GROSS, THE NEW TELEVISION TECHNOLOGIES 141-45 (1983); *see also* Halpern, *Adirondack TV: A Low-Power Gamble,* N.Y. Times, Jan. 11, 1988, at B1, col. 2 (discussing a particular LPTV station).

58. *See, e.g.,* L. POWE, AMERICAN BROADCASTING AND THE FIRST AMENDMENT (1987).

59. *See, e.g.,* notes 40 & 43 *supra.*

60. *See* note 23 *supra.*

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gests that one way to promote more meaningful access, and thus the first amendment values we want to serve, could lie in creative structural regulation of the industry, perhaps with common carrier features, based loosely on the antitrust model.[61] The advent of new technology may give us the opportunity to put a new regulatory scheme in place, and such a scheme might allow the elimination of many of the features of the regulatory structure we now maintain. The fact that we don't now so regulate print should not be a dispositive bar; this may be our chance to try again and do a better job.

## VI

I will have rather less to say about the second part of Professor Spitzer's book, in part because Spitzer himself has rather less to say in the second part of his book than he does in the first. In this part of the book, Spitzer examines a number of studies found in the psychological literature relating to the psychological effects of television watching generally, and of exposure to sexually explicit and violent programming in particular. Without engaging in extended theoretical analysis, he concludes that the studies for the most part do not justify different treatment of print and broadcast. He does conclude, however, that some regulation, on the zoning model, may be appropriate to shield children from profanity, pornography, and violence on the airwaves.

The psychological studies Spitzer canvasses in this part of his book relate to an attack on our "marketplace of ideas" mythology wholly different from any I have discussed so far. This attack, a deeper one, challenges the psychological premise of that metaphor. That premise is that we respond to communication on a rational level, and thus can fairly treat new ideas and information on the level of rational discourse: that is, "that there is on the whole a preponderance among mankind of rational opinions and rational conduct,"[62] and thus that we can properly treat speech as a competition of ideas in the metaphorical marketplace.

Much of the psychological literature Spitzer cites, however, tends to call that mythology into question. Spitzer discusses, for example, a study indicating that male college students who had watched a short movie of a gunpoint rape later showed greater propensity to give women targets electric shocks on a "Buss aggression machine" than did students who had watched movies of a talk show interview or movies of consensual sex.[63] Such a study might suggest that the students, on a

61. On the other hand, the recent controversy regarding a cross-ownership waiver allowing Rupert Murdoch to maintain ownership of both newspapers and television stations in New York and Boston demonstrates that the administration of even "neutral" structural rules can import political distortion into the regulatory mechanism. *See* N.Y. Times, Jan. 11, 1988, at A13, col. 1.

62. J.S. MILL, ON LIBERTY 17 (R. McCallum ed. 1946) (1859).

63. Each subject was told that he could use the machine to shock another person described to him as a fellow subject. The shocks were usually described as part of an evaluation of the other's

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nonrational level, "learned" aggression against women from the films, almost as a conditioned response.[64] This raises questions that are especially troubling in light of the pernicious nature of the messages conveyed here: To what degree do people "learn" on a wholly nonrational level from the messages they receive? How far is the gap between that reality on the one hand, and the mythology that I have described on the other? Do we base our policy conclusions on views of the world that are not in fact accurate, and does it make sense to do so?

These are much the same sort of questions as those that I posed regarding the first part of Spitzer's book. Our regulation of the mass media is built upon a Lockean image of people as free, equal, rational agents, but the economic and psychological insights Spitzer draws upon call that image into question. As in the first part of his book, however, Spitzer does not address the question whether the models through which we think about speech fail us by being too far divorced from reality. Rather, he asks whether they fail us *in the same way* in print and in broadcast, and thus whether their failure can justify different regulation.

I have trouble with several of the steps Spitzer takes in travelling that road. First, as Spitzer acknowledges, he labors under a serious handicap in answering the question he does pose: whether we react to sexually explicit or violent material differently when it is presented in print or in video form. Almost none of the studies Spitzer examines were designed to answer that question.[65] Indeed, the difficulty in deciding what to use as "comparable" depictions of sex or violence in the various media suggest that no study could reliably answer that

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performance on some sort of test. In fact, the machine merely recorded the number and intensity of shocks that the subject tried to inflict. Pp. 77-80.

There is substantial reason to doubt whether studies of the performance of college students on Buss aggression machines say very much about the real world. Spitzer acknowledges this point, but dismisses it: "The resolution of this question is irrelevant for the purposes of this book, so long as it is resolved in the same way for print experiments and broadcast experiments." Pp. 143-44 n.12. For an exposition of the view that experimental data is useless in this area, see Wilson, *Violence, Pornography, and Social Science,* 22 PUB. INTEREST 45 (1971).

64. The study as described does not necessarily demonstrate nonrational learning on the students' part. The study was fairly complex, involving both subjects whom the experimenter had intentionally made angry before showing the films, and subjects who had not been made angry. The study also involved both male and female targets. When the target was male, both the consensual sex and the rape movies increased aggression (at least in angered subjects), and by roughly the same amount. When the target was female, only the rape film increased aggression. Pp. 78-79. Different aspects of the experiment might support a variety of explanations, including the one set out in text, or conversely, the notion that subjects in some cases became sexually aroused but, through what some psychologists call an arousal mislabeling mechanism, mistook their arousal for increased anger. Which hypotheses we come to accept, needless to say, can have implications for the policy conclusions we draw.

65. Spitzer does discuss one elaborate study designed to examine the relationship between London boys' propensity to engage in violence and their exposure to reports and stories of violence through television, newspapers, movies, and comic books. The study was financed entirely by the CBS television network. Pp. 107-10.

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question.[66]

Further, one of Spitzer's conclusions — that "print [depictions of sexually explicit matter] may be slightly more potent than video" (p. 86) — seems to me almost wholly unrelated to the studies from which he purports to draw it.[67] Spitzer bases this conclusion on his statement that "sexually explicit print material may increase aggression regardless of whether or not subjects are angered, and regardless of whether or not they are disinhibited from aggression against women" (p. 86). When one pulls the jargon out of this sentence and tries to figure out the inference Spitzer has in mind, he is apparently saying two things. First, he is apparently saying that sexually explicit print material is more likely than video to lead to aggressive behavior in men who have *not* first been made angry by the experimenter. Second, he is apparently saying that sexually explicit print material is more likely than video to lead to aggressive behavior in men who have not been "disinhibited," that is, who have *not* been given repeated chances to aggress against women or been shown material whose message is that women invite or enjoy rape (p. 85).

The problem is that the studies Spitzer cites do not support these conclusions. He cites only one study that addresses the effect of sexually explicit print material on subjects who have not first been made angry, and criticizes that study as methodologically flawed.[68] He cites a study concluding that showing men video depictions of rape does increase their aggression against women even when they have not been first made angry.[69] Indeed, he cites studies indicating that the effect of showing at least some sexually explicit video material to angry male

66. Spitzer states, with reference to sexually explicit material, that "[p]hotographs and stories about the same explicitly erotic acts depicted in films or television could be used. A study employing such graphic printed material could test for the differential effects of the two media." P. 93. Yet this blinks the fact that movies and printed matter are different media, and a depiction in one can be transformed to the other only through a creative process. One depiction may be more skillfully done than another; a particular story may translate more effectively into one medium than to another. Thus if, for example, experimenters seek to make a movie out of a given (print) story, the results might well rest entirely on how expert a job of movie-making they do.

67. In examining the link between sexually explicit material and aggressive behavior, Spitzer walks through a fairly large number of studies exploring the effects of films, pictures, and short stories depicting rape and consensual sex on test subjects' proclivity to aggress and on their attitudes towards aggression in general and rape in particular.

> Print, television, film, radio, slides, and live readings were all employed.
>
> . . . Subjects were exposed to a broad range of sexually explicit matter, everything from consensual behavior to forced sexual contact which the victim detested to forced sex which the victim ultimately enjoyed. Some researchers added an anger variable, insulting or electronically [sic] shocking their subjects, while others did not. P. 77.

The test subjects were almost always men.

68. Spitzer criticizes the study on the ground that it did not distinguish between material depicting consensual sex and that depicting rape; he also states that the study "contradicted the findings of earlier works." P. 89.

69. The same study concluded that exposure to sexually explicit video material did not otherwise significantly increase aggression in subjects who had not been made angry. P. 85.

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subjects was to increase their aggression, but that the effect of showing (print media) pictures of attractive nude or seminude women to such subjects was to make them *less* aggressive, perhaps by distracting them from their anger. The overall effect of the studies Spitzer cites, I believe, is ambiguous and unhelpful on the question he poses. But whatever those studies show, they do not show that sexually explicit print material is more "potent" than video.

Similarly, Spitzer's studies do not support the notion that print may increase aggression more than video where subjects have not been given repeated chances to aggress against women or shown material whose message is that women invite or enjoy rape. No print studies cited by Spitzer address the link between these factors and aggression at all. Some video studies tend to demonstrate a link between these factors and aggression. That is, one study indicates that angering male test subjects, showing them sexually explicit films, and then giving them the opportunity to aggress repeatedly against women, tends to lead to increased levels of aggression on the Buss aggression machine. Another indicates that showing male test subjects films that depict women as ultimately enjoying rape tends to increase those subjects' aggression against women. But if Spitzer is reasoning from these studies that *print* is more "potent" because it increases aggression "regardless of whether or not [the subjects] are disinhibited," (p. 86) then his conclusion does not follow at all.

Spitzer ultimately puts forward his own proposal for protecting listeners from unexpected objectionable material on the broadcast airwaves, and allowing parents to keep such material from their children. "[B]roadcast stations that transmit objectionable matter could be allowed to broadcast anything that would be legal if printed, but such stations would be concentrated in one section of the spectrum."[70] Adults scanning the broadcast spectrum could avoid that "adult" section if they chose. Further, retailers would not be allowed to sell devices receiving that portion of the spectrum to minors, and television locks would allow parents to disable their sets entirely.

Spitzer does not discuss, but I wonder, what the implications of this further zoning requirement would be for his plan for market allocation of spectrum. Spitzer argues early in the book that on the "quite plausible assumptions" that "telecommunications will continue to enjoy rapid technological development and that bureaucratic planners would be slow to modify zone assignments[,] . . . the zones would always be wrong" (pp. 23-24). As a practical matter, it seems to me that a rule relegating objectionable speech to specified spectrum zones would likely either impede the market's ability to allocate to other uses spectrum so zoned, or impose a substantial ban on such speech in the broadcast medium.

70. P. 126; *see also* p. 123.

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## VII

Spitzer's analysis of what he terms the economic justifications for content regulation of broadcast suffers from a lack of focus on the issue of content regulation, but Spitzer does advance engaging theses on what broadcasting might look like if we regulated it by means of a property rights model. While those theses are vulnerable to a number of attacks, the resulting analysis helps demonstrate the wide range of choices we have in shaping communications regulation. It also helps point up an economic insight we often lose sight of in thinking about communications regulation: Mass communication today is not a game that all can play, and indeed even receiving speech may increasingly prove too expensive for some.

Spitzer's analysis of the effects of various forms of programming on viewers even more directly points up a psychological insight we generally ignore in thinking about communications regulation: We process speech on nonrational levels, and to that extent "more speech" may not be the counter to pernicious messages that our system assumes that it is.

Spitzer's analysis thus brings fresh perspectives to the old question of how to regulate broadcasting. While many may quibble with Spitzer's conclusions and reasoning, the argument serves splendidly in stimulating the reader to new insights and ideas. Unfortunately, Spitzer seems to have no interest in answering some of the most important questions his analysis raises. Spitzer ultimately concludes that "anyone who cherishes the free market in print must regard the regulation of broadcasting as unjustified" (p. 131). But the "free market in print" has flaws as well as virtues. Before imposing it uncritically on broadcast, we might think further about whether the rules governing our print media are necessarily the best way to achieve the free speech we believe in.

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PUBLIC PRAYER AND THE CONSTITUTION. By *Rodney K. Smith.* Wilmington: Scholarly Resources, Inc. 1987. Pp. xv, 294. $35.

A literal reading of the first amendment's religion clauses[1] has long revealed a natural contradiction between an order not to establish religion and a command not to inhibit its practice. The issue of public prayer sharply illustrates this conflict, as a doctrinaire reading of either order could render publicly-supported prayer either impossible or untouchable. In an attempt to reconcile this conflict, Professor Rodney Smith[2] argues that the values suggested by the first amendment's constitutional history provide the "very treasure" (p. 7) needed to resolve difficult public prayer cases. While Smith does rehash much of the frequently analyzed history of the religion clauses,[3] this book does more than merely reexamine historical data; much of *Public Prayer and the Constitution* demonstrates how the modern Supreme Court could apply these historical underpinnings to make its current public prayer decisions more consistent and legitimate. By using this history to suggest guidelines for the Court, Smith joins the growing ranks of interpretivist scholars who advocate originalism as the proper tool for modern constitutional analysis.[4]

*Public Prayer* basically undertakes three tasks: an examination of the relevant constitutional history, an overview of the Supreme Court's treatment of public prayer, and suggestions for how the judici-

1. Labeled the establishment and free exercise clauses, the religion clauses require that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

2. Associate Professor of Law, Delaware Law School of Widener University. Major portions of this book first appeared in Smith, *Getting Off on the Wrong Foot and Back On Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the* Reynolds *and* Everson *Decisions,* 20 WAKE FOREST L. REV. 569 (1984), and Smith, *Now Is the Time for Reflection:* Wallace v. Jaffree *and Its Legislative Aftermath,* 37 ALA. L. REV. 345 (1985).

3. One scholar has concluded that the "search for original meaning and historical purpose underlying this language [of the first amendment's religion clauses] has yielded inconclusive results, and it would not be profitable to explore this matter in detail. In the end the Supreme Court is free to give this language the meaning it chooses . . . ." P. KAUPER, RELIGION AND THE CONSTITUTION 47 (1964).

4. In assuming that originalism is the obvious choice of constitutional interpretation, Smith's treatment of the major interpretation debate is cursory at best. However, great disagreement exists as to the proper utilization of the history of the Constitution's framing. *Compare* Sandalow, *Constitutional Interpretation,* 79 MICH. L. REV. 1033 (1981) (historical evidence of the framers' intent cannot constrain modern interpretation) *and* Brest, *The Misconceived Quest for the Original Understanding,* 60 B.U. L. REV. 204 (1980) (guessing how the framers would view today's radically different society is an inappropriate way to protect constitutional guarantees) *with* Monaghan, *Our Perfect Constitution,* 56 N.Y.U. L. REV. 353 (1981) (the nondemocratic nature of the Court mandates self-restraint and an originalist reading) *and* Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1 (1971) (the historically demonstrable intentions of the framers should be binding on contemporary interpreters of the Constitution).



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ary could render decisions compatible with original intent. While the first part proves useful, Smith's attempt to clarify the thorny public prayer issue ultimately fails because no clear and consistent approach can be fashioned from either the framers' intent or the values prevalent in colonial America.

Smith begins his analysis by demonstrating that America's concern for individual religious liberty and free exercise was paramount during the colonial era. As a consequence, a high degree of religious tolerance existed during this period, since the "pluralistic nature of the religious and economic forces in the colonies" (p. 35) mandated a spirit of cooperation. From this religious climate emerged two distinct positions delineating the extent of American religious freedom: (1) those who viewed Christianity as the national and "established" religion, and (2) those who felt that individual expression could be accommodated but no one religion preferred.

Smith associates the former position with Justice Joseph Story, since Story later became a leading proponent of nondenominational Christianity during the early eighteenth century (p. 108). As to the latter principle, Smith credits James Madison, often considered the primary framer of the first amendment. In fact, Smith states that "it is Madison's role along with that of other advocates of religious liberty . . . that must be examined to ascertain the intent of the framers " (p. 64).

It is a crucial assertion of *Public Prayer and the Constitution* that the views of Story and Madison form the outer parameters for judicial interpretation of the religion clauses. While these positions admittedly delineate a broad latitude for constitutional decisionmaking, and in some cases even allow for judicial discretion, Smith asserts that no legitimate Supreme Court doctrine can exist outside of these two poles. Doctrine that effectively bars, or mandates, governmental involvement with religion operates outside of this framework, and is therefore constitutionally suspect (p. 293).

For Madison, the state's nonpartisan treatment of all religions was most important. In response to a state bill that would have supported Christianity as the established religion of America, Madison produced his *Memorial and Remonstrance,* written in 1785 and considered by Smith to be the "critical document" (p. 50) for understanding both Madison's views and ultimately the values behind the language of the first amendment. According to Smith, Madison's "primary concern" in *Memorial* was "with securing religious liberty rather than with assuring that the government prohibit all public expressions of religious faith" (p. 56). To secure this liberty, Madison felt it was vital that no single religion or sect be aided or established to the exclusion of less popular religions. As the right to free exercise was an "inalienable right," the Madisonian position held that a government "acted in der-

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ogation of th[is] inalienable right" (p. 59) if it preferred one religion over another.[5]

While these Madisonian ideals influenced the framers, Smith notes that Justice Story played a major role in the initial application and interpretation of the religion clauses. The view that Christianity should serve as the national religion arose in the first half of the eighteenth century, and culminated in the 1833 publication of Story's *Commentaries on the Constitution*, a major work on the probable intentions of the first amendment's framers. Story notes that the framers encouraged the public promotion of nondenominational Christianity, so long as other religions were tolerated (p. 108). In addition, the *Commentaries* concluded that "[a]n attempt to level all religions, and to . . . hold all in utter indifference, would have created universal disapprobation if not universal indignation."[6]

Based on these writings, Smith asserts that both Story and Madison concurred in the belief that free exercise was the preeminent value protected by the first amendment; "the Establishment Clause merely helped to effectuate [this value]."[7] Whether one adopted the Madisonian position or a view more supportive of Christianity as the national religion, Smith states that in the revolutionary era "there was little if any support for the principle that government should be precluded from accommodating or recognizing religious exercise in any form."[8] In demonstrating how prevalent religion was in the public sector, Smith notes that in the Declaration of Independence there were four references to God, and that in 1777 the Continental Congress had imported nearly twenty-thousand Bibles.

After describing the major positions on religious liberty during the revolutionary era, Smith analyzes the debates and congressional wrangling over the drafting of the first amendment. The debates suggest that Congress also viewed the free exercise portion of the amendment as paramount, as several Senators, especially those who advocated a

5. In another recently published work on the subject, Thomas Curry has argued that Madison opposed all governmental assistance of religion, even nonpreferential support. T. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 209 (1986).

6. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 593 (2d ed. 1851).

7. P. 111. Indeed, Smith presents some evidence indicating that the First Congress saw the sole function of the establishment clause merely as a prohibition against establishing a national religion, not as a general preclusion against all government sponsorship. P. 95.

8. P. 66. One prominent revolutionary figure who did support this principle was Thomas Jefferson. In an 1802 letter, Jefferson declared that the religion clauses "built a wall of separation between Church and State." P. 61. While contemporary strict separationists have used this comment to support their position, Smith thinks the letter of little value. First, Smith maintains that Jefferson's metaphor did not mean strict separation "in the sense that those terms have been used in the twentieth century." P. 62. And even if Jefferson did intend such a result, Smith contends that "Jefferson's role with regard to the adoption of the First Amendment was peripheral at best." P. 63.

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Christian republic, voiced concern over the chilling effect that a generalized establishment clause might produce. In support of his conclusion that the First Congress "did not intend to render all public manifestations of religious devotion unconstitutional," (p. 97) Smith notes that both the House and Senate adopted a national day of public fasting and prayer in celebration of the passage of the Bill of Rights. Using these and other examples (such as a congressionally approved treaty establishing a national church for an Indian group) (p. 105), Smith concludes that no support can be found for the "strict separation of church and state as we know it today" (p. 105).

Much of the modern "strict separationism" that Smith decries,[9] and much of what he sees as the current constitutional illegitimacy, can be traced to the Supreme Court's first treatment of the religion clauses. For Smith, both *Reynolds v. United States*[10] and *Everson v. Board of Education*[11] represent a gross misapplication of constitutional history. In *Reynolds,* its first free exercise case, the Court held that polygamy, practiced by many orthodox Mormons of the time, could be proscribed if it "br[oke] out into overt acts against peace and good order."[12] This rationale was far more restrictive of individual religious freedom than either the Madison or Story positions, which would have allowed a limitation on this inalienable right only when the religious activity was "manifestly injurious" to the state's interests (p. 122). "Fortunately," Smith notes, more recent decisions have partially redressed this initial misapplication; the current test allows regulation of religious practices only "when there is a compelling state interest that justifies such regulation" (p. 124). While this less intrusive test does reduce governmental regulation of religion, Smith urges the Court to support its rationale with specific references to Madison and Story.

The *Everson* decision, however, arouses Smith's greatest ire. In its first establishment clause case, the Court, per Justice Black, allowed public funds to be used to provide bus transportation for children attending parochial schools, despite objections that this action actively "established" religion. Although this result was consistent with both the Madison and Story views (p. 126), Smith harshly criticizes Black's application of the relevant constitutional history. By concluding that "individual religious liberty could be achieved best under a government which . . . [did not] interfere with the beliefs of any religious

9. Smith is so critical of the modern "strict separationists" — those who view any governmental accommodation of religion as constitutionally impermissible — that one begins to wonder if this critique is not the real purpose behind the book. Smith asserts that this view emanates not from the colonial or founding era, but rather from "the second quarter of the twentieth century." P. 56.

10. 98 U.S. 145 (1878).

11. 330 U.S. 1 (1947).

12. *Reynolds,* 98 U.S. at 163.

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individual or group,"[13] Justice Black credited the framers with adopting a view of strict separation, a position Smith feels too severely restricts individual rights of free exercise (p. 129). Smith points out that Black could have avoided such language by supporting his result with Madison's *Memorial and Remonstrance* or the ratifying debates, as both demonstrate that nonpreferential aid to sectarian students is permissible. Even worse for Smith, subsequent decisions concerning religious expression have relied on *Everson*'s improper reading of the framers, thereby entrenching the Court in decades of constitutional conflict (p. 131).

After exposing the weak historical foundations of the Court's establishment clause doctrine, Smith discusses several public school prayer cases and in each instance demonstrates how the Court could have maintained fidelity to original intent by deciding the case using either the Madison or Story positions. The Court first examined school prayer in *Engel v. Vitale*[14] and *School District v. Schempp*.[15] In *Engel,* the Court prohibited the in-class reading of a short, nondenominational prayer commissioned by a state agency, holding that the "union of government and religion tends to destroy government and to degrade religion."[16] In *Schempp,* the Court held that the establishment clause prohibited the Pennsylvania legislature from mandating the reading of several Bible verses before the start of each school day.

Smith acknowledges that the Court could have decided *Engel* and *Schempp* either way, as the diverging Madison and Story positions produce conflicting outcomes. Proponents of Story's view believed that a tolerant, but nondenominational, Christianity should be the national religion; therefore, they would have upheld the prayer practice in *Engel* and the Bible recitation in *Schempp*. Madison, however, would require the state to refrain from preferring or adopting any particular mode of worship; therefore, neither the *Engel* nor the *Schempp* practice would survive first amendment review.

Had the Court confined its reasoning within these positions, Smith asserts, the Justices could have achieved greater legitimacy as well as greater fidelity to original intent (p. 185). Instead, both *Engel* and *Schempp* are "heavily imbued with the strict-separationist rationale first articulated in *Everson*" (p. 172), and as such pose the same problem presented by *Everson:* the results were constitutionally supportable, but the Court's rationale — in limiting the importance of individual religious exercise — surely was not.

Besides the issue of vocal prayer recitations presented by *Engel* and *Schempp,* Smith reviews the Court's recent performance in *Wal-*

13. *Everson,* 330 U.S. at 11.

14. 370 U.S. 421 (1962).

15. 374 U.S. 203 (1963).

16. *Engel,* 370 U.S. at 431.

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*lace v. Jaffree,*[17] the seminal silent prayer case. The issue of silent prayer, Smith admits, is "the most difficult problem covered in this book, in terms of applying the views of Story and Madison" (p. 214). In *Wallace,* the Court struck down a state statute mandating a one-minute period of silence for meditation or voluntary silent prayer, concluding that the legislature intended to convey a message of state approval for religious activities in the public schools. Again, Smith demonstrates how the Story view would have supported such silent activity, especially given that its major purpose was to encourage voluntary prayer (p. 210). But for Madison, the issue would be less clear given the language "voluntary prayer," which could be interpreted as promoting a particular mode of worship (in which case Madison would not support it), or as facilitating individual exercise (in which case the practice would be permissible). Because neither the Madison nor Story position serves as a panacea for the silent prayer issue, Smith acknowledges that the courts are not so constrained by original intent. Using this greater discretion, courts are thus free to "engage in independent balancing of various policies" (p. 214).

Not only does Smith admit that the result in several recent decisions is constitutionally legitimate (p. 234), he also notes the increasing use the Court has recently made of the relevant history. For example, Justice Rehnquist's dissent in *Wallace* examined Madison's writings as well as Story's *Commentaries* in a search for the implicit values contained within the religion clauses. Further, the Court's opinion in *Marsh v. Chambers,*[18] a case upholding the Nebraska legislature's right to hire a chaplain to preside over the opening prayer, is replete with references to the religious practices of the ratifying era. Rather than relying on the three-part test announced in *Lemon v. Kurtzman,*[19] Chief Justice Burger's opinion adheres closely to the Story view, which permits hiring a chaplain so long as no Christian sect is preferred over another (p. 257). Even the dissent, authored by an ardent nonoriginalist (Justice Brennan), utilizes certain Madisonian principles to argue against the chaplain's use.

For Smith, the debate in *Marsh* is highly encouraging since it proceeds within his framework of legitimate constitutional analysis. In addition, the Court gives due deference to "definite historical roots"

17. 472 U.S. 38 (1985).

18. 463 U.S. 783 (1983).

19. 403 U.S. 602, 612-13 (1971). It is odd that Smith does not find space to criticize the *Lemon* Court's three-pronged test for establishment clause violations. This test analyzes all suspect legislation by inquiring: (1) whether the statute has a secular purpose; (2) whether the statute's primary effect either advances or inhibits religion; and (3) whether the statute fosters an "excessive entanglement" with religion. Smith admits that this test "certainly inhibits individual religious exercise," but he makes no effort to argue, as others have, that this test is the real cause behind the Court's inconsistent establishment clause opinions. P. 284. *See, e.g.,* Laycock, *A Survey of Religious Liberty in the United States,* 47 OHIO ST. L.J. 409, 450 (1986) (arguing that the *Lemon* test is "so elastic in its application that it means everything and nothing").

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(p. 258), another factor Smith would accord great weight. Yet Smith, perhaps doubting whether other "legitimate" decisions will arise again, warns the Court that disregarding the originalist parameters will trigger a justified "time for concerted legislative action" (p. 235).

Continuing this none-too-subtle warning, Smith's final chapter suggests ways to change the Court's role in religion cases. While expressing disapproval of the recent attempts to limit the court's jurisdiction in public prayer cases,[20] Smith sees no problem with ultimately revising the first amendment. He suggests that a "general, principled amendment could be fashioned . . . after the Madisonian approach" (p. 293) so as to protect individual expression from the "tyranny of the majority" (p. 275 n.32). However, Smith concludes that the time for such a revision has not yet come since the Court has remained relatively faithful to the Madisonian position. Because it has "continued to render decisions within the limits set by the framers' intent" (p. 275 n.32), the Court has not yet provided the justification for dramatic action by either Congress or the nation.

This conclusion is a troubling one and undermines much of the book's force. By first asserting that the Supreme Court has fallen prey to the conflicting orders inherent in the religion clauses, but then admitting that the recent Court has been faithful to original intent, Smith weakens his key premise that this original intent provides the values necessary to resolve these conflicting orders. Also, merely stating that greater respect should be accorded the value of individual expression is not helpful, since Smith fails to explain how this respect would avoid the thorny problem of government entanglement that has plagued the Court in past cases. Thus, Smith's major goal remains unfulfilled: neither the Madison nor Story position provides the Court with enough vision to fashion a clear and consistent approach to the public prayer cases.[21]

Finally, Smith adds nothing to the controversial debate over original intent analysis.[22] He devotes very little effort to rebutting the arguments of the noninterpretivists, and the values Smith derives from original intent seem to lead not to a heightened legitimacy for Supreme Court doctrine but rather to the same inconsistencies that have beset those who advocate interpretivism. While Smith provides a

20. *See, e.g.*, S.47, 99th Cong., 1st Sess. (1985) (bill introduced by Senator Helms would eliminate federal court jurisdiction in cases involving voluntary prayer, Bible reading, and religious meetings in the public schools).

21. Actually, this book would be more aptly titled, as its unspoken purpose suggests, "An Attack on the Strict Separationists." Here, Smith achieves some success by demonstrating that none of the framers advocated the type of government prohibition espoused in Everson v. Board of Educ., 330 U.S. 1 (1947). But even this success is diminished by Smith's admission that several recent Supreme Court decisions have respected individual religious exercise to a greater degree than in past cases. Pp. 257-58.

22. See note 4 *supra* for a brief summary of the major positions.

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useful summary of the major positions surrounding the framing of the religion clauses, neither the Court nor the combatants on either side of this first amendment debate will gain much new insight from *Public Prayer and the Constitution.*

— *Ethan M. Posner*

REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS. By *Samuel Estreicher* and *John Sexton.* New Haven: Yale University Press. 1986. Pp. x, 201. $20.

Observers of the United States Supreme Court have noted for some time the immensity of the Court's workload and the burgeoning number of cases and petitions it faces each term.[1] The justices themselves have made public comments on the Court's heavy case load.[2] Indeed, the Court does face a staggeringly large number of cases: in the 1986-1987 term, for example, the Court's docket included 5,123 cases,[3] up from 937 in 1934 and 1,940 in 1960.[4]

One commonly suggested response to the crisis — or potential crisis[5] — is that Congress, pursuant to its article III power, establish an intermediate court of appeals, situated between the current circuit courts and the Supreme Court.[6] The proposals have included creation of a National Court of Appeals (NCA) that would screen certiorari

1. *See, e.g.,* Baker & McFarland, *The Need for a New National Court,* 100 HARV. L. REV. 1400 (1987); *Rx for an Overburdened Supreme Court: Is Relief in Sight?,* 66 JUDICATURE 394 (1983) (panel discussion); Griswold, *Rationing Justice — The Supreme Court's Caseload and What the Court Does Not Do,* 60 CORNELL L. REV. 335 (1975).

2. *See, e.g.,* W. BURGER, 1984 YEAR-END REPORT ON THE JUDICIARY 6 ("Supreme Court Justices must now work beyond any sound maximum limits."); Brennan, *Some Thoughts on the Supreme Court's Workload,* 66 JUDICATURE 230 (1983); White, *Challenges for the U.S. Supreme Court and the Bar: Contemporary Reflections,* 51 ANTITRUST L.J. 275 (1982).

3. *Statistical Recap of Supreme Court's Workload During Last Three Terms,* 56 U.S.L.W. 3102 (Aug. 11, 1987).

4. R. POSNER, THE FEDERAL COURTS 62 (1985).

5. Most observers have discussed the case load situation with some degree of concern for its effects on the quality of the Court's work product. Professor Strauss, for example, suggests that it has forced the Court to issue opinions that focus more on explicating doctrine than on resolving the dispute at bar. This "challenges widely accepted models of and justifications for judicial decision." Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action,* 87 COLUM. L. REV. 1093, 1095 (1987).

6. Article III states: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

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petitions and resolve intercircuit conflicts[7] and an NCA that would hear only cases referred to it by the Supreme Court.[8]

In response to these proposals, Professors Samuel Estreicher[9] and John Sexton[10] in 1983 undertook a large-scale study of the Court's docket, with an eye toward evaluating the NCA concept (p. ix). This book, a summary of the study results as published in complete form in the *New York University Law Review*,[11] is a brief but thorough and persuasive discussion of the authors' main conclusions, most notably their view that the Court poorly manages its docket and needs to alter fundamentally its vision of its role in the federal judicial system.

After studying in great depth all the cases that the Court agreed to hear, and all "paid" cases it refused to hear, from the 1982 Term,[12] the authors (with the assistance of the *N.Y.U. Law Review* staff) found that the Court is wasting its time hearing and deciding the wrong cases. Specifically, they concluded:

- Almost one-fourth of the cases the Court heard "had no legitimate claim on the Court's time and resources."
- More than one-half of the cases heard were discretionary.
- The Court *denied* review in an insignificant number of cases — less than one percent of the time — where review would have been proper. [p. 6]

These are serious claims that, if true, carry serious implications for the purportedly "overburdened" Court. If Estreicher and Sexton's analysis is correct, the Court's overwork crisis is illusory; the justices need only revise their way of operating and the excess case burden will disappear. The authors' claims emerge from their fundamental assumptions about the Court's role in the federal judicial system, as-

7. This proposal was made by the so-called Freund Committee. *See* Federal Judicial Center, *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573 (1972). Chief Justice Burger appointed the committee in 1971.

8. The Hruska Commission, created by Congress in 1972, made this proposal following its study of the federal courts. For its report, see Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195 (1975).

The predominant view appears still to be in favor of some additional institutional layer in the federal courts. *See, e.g.*, Baker & McFarland, *supra* note 1 (arguing for an Intercircuit Panel to unify national law). *But cf.* Ginsburg & Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1435 (1987) ("No second national court is needed to assist the Supreme Court in doing better what it already does quite well and often enough.").

9. Professor of Law, New York University Law School. B.A. 1970, J.D. 1975, Columbia University, M.S. 1974, Cornell University.

10. Professor of Law, New York University Law School. B.A. 1963, M.A. 1965, Ph.D. 1978, Fordham University, J.D. 1979, Harvard Law School. Both Professor Estreicher and Professor Sexton are former Supreme Court clerks, Estreicher for Justice Powell and Sexton for Chief Justice Burger.

11. *New York University Supreme Court Project*, 59 N.Y.U. L. REV. 677-1929 (1984).

12. The study therefore analyzed a total of 2061 cases. P. 76. The Court's docket is about evenly split between cases that are "paid," and those that are "in forma pauperis," for which costs are waived. A handful of cases arise under the Court's original jurisdiction. *See* 56 U.S.L.W. at 3102.

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sumptions they illustrate through a proposed set of specific and limiting criteria for case selection.

The authors challenge what they term "the popular view" of the Court, the view that the Court should be "ever ready to correct the errors of subordinate courts and ensure a just result in each case" (p. 1). They argue instead that the Court's mission should be "to manage the process of national lawmaking," and not "to search for interesting (or even 'important') questions" (p. 6). Under this proposed "managerial" theory, the Court would not view itself as a corrector of lower-court error or as a last refuge for frustrated litigants.[13] Rather, the Court would "accord a presumption of regularity and validity to the decisions of state and lower federal courts," and intervene only "when some structural signal (such as a persistent conflict between subordinates) indicated a problem requiring correction" (p. 50). The authors explain: "A wise manager delegates responsibilities to subordinates and, when there is no indication that something is awry, does not intervene. To do otherwise is to denigrate the authority of subordinate actors" (p. 50).

As part of this managerial function, Estreicher and Sexton argue, the Court should adopt a set of well-defined, specific criteria for selecting cases, thereby moving away from the ambiguity of Supreme Court Rule 17, the current guideline.[14] The initial step would be to divide the Court's docket into three distinct categories: the priority docket (cases the Court *should* or *must* hear), the discretionary docket (cases it *may* hear), and the improvident grants (cases where review is inappropriate) (pp. 44-45).

The priority docket would consist of cases that "press for immediate . . . review" (p. 52), not necessarily cases that present the most important or controversial issues. For example, a pressing case would require the Court to resolve an "intolerable" conflict among the federal appellate courts (p. 53). Disputing the notion that any conflict among the circuits requires Supreme Court attention, the authors argue that only "when litigants are able to exploit conflicts affirmatively through forum shopping or when planning is thwarted by the absence of a nationally binding rule" (p. 57) should the Court step into the fray and provide its own interpretation. The other priority situations present similar "conflicts," some within the judicial branch, and some be-

13. For example, they state in conclusion that the Court "must be demythologized. We no longer have a national court of errors ready to right any wrong committed by a lower court in a federal case. . . . It is not the Supreme Court's job to ensure justice in the particular case." Pp. 135-36.

14. Rule 17 states, in part, that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." SUP. CT. R. 17. Rule 17 does go on to list some criteria that the justices will take into consideration, but cautions that the criteria are "neither controlling nor fully measuring the Court's discretion." *Id.*

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tween various branches or levels of government, such as an interstate dispute (pp. 59-62).

Cases grouped under the discretionary docket tend to be those that present "important," but not necessarily crucial issues. Many of the cases that fall within these suggested certiorari criteria involve situations of "plainly erroneous" decisions by federal appeals courts or state supreme courts, often in cases that involve relations among the various levels of government, such as "vertical federalism" disputes.[15] The authors explicate this category by example, listing kinds of cases that, consistent with the managerial theory, the Court may properly hear, but which are subordinate to "priority" cases.[16]

The improvident grant category encompasses the remainder of cases, and consists of little more than cases that do not fall into one of the previous two groups (pp. 69-70). Throughout the book, the authors stress the importance of what they term "percolation": the various initial efforts by state and lower federal courts at resolving novel and difficult legal questions prior to ultimate resolution by the Supreme Court (p. 48). Most improvident grants occur when the Court has not allowed sufficient percolation of an issue, as in the case of a conflict between only two circuits that poses no problems of forum shopping (p. 69). The authors note one improvident grant case[17] in which the granted certiorari petition could point only to one unappealed district court case conflicting with the Eleventh Circuit case at bar. Although the authors believe that the issue presented was "surely one of national significance," and the decision below "palpably incorrect," they claim that the Court should have awaited fuller percolation instead of simply correcting error in the isolated instance.[18]

The apparent simplicity of the authors' argument — their view essentially is that the Court can reduce its workload by *hearing fewer cases* — should not lead one to mistake the importance of their analysis. Although the book purports to be only an evaluation of proposals for an additional layer of the federal courts (p. 71), the authors do

15. A "vertical federalism" dispute involves a conflict of state-federal relations. P. 63. However, "profound" vertical federalism disputes — federal court invalidation of state or local statutes, and state invalidation of federal statutes — are assigned to the priority docket. Pp. 60-61.

16. Some examples of discretionary docket cases include those where the Court is suspicious of a state court's treatment of a federal question, resolution of a national emergency, and cases that require an exercise of the Court's "extraordinary power of supervision." Pp. 62-69.

17. Hishon v. King & Spalding, 467 U.S. 69, *reversing* 678 F.2d 1022 (11th Cir. 1982). The case presented the issue of whether the ban on sex discrimination in employment contained in Title VII of the Civil Rights Act of 1964 applies to law firm partnership decisions.

18. P. 95. Professor Strauss argues that, at least in the administrative law area, the Court is *too* tolerant of circuit conflicts:

> [T]he Court's awareness how frequently it is able to review lower court decisions has led it to be tolerant, even approving, of lower court and party indiscipline in relation to existing law. . . . The result puts added stress on some ideas about obedience to law and on the uniformity of national law administration.

Strauss, *supra* note 5, at 1095.

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concede that the implications of their study "radiate well beyond" those proposals (p. 128). Indeed, their proposals embody many specific assumptions about what types of "structural" issues are important enough to warrant Supreme Court review. For example, one criticism the authors anticipate is that their criteria fail to afford adequate protection for individual constitutional litigants (p. 72). They respond, in part, that they "find no compelling need to disturb the presumption of regularity [of a lower court decision] simply because a constitutional question is involved," adding that they "reject the notion that constitutional cases are necessarily more important than other kinds of cases."[19] That appears inconsistent with the authors' placing of some constitutional cases in the priority docket, such as a federal court's invalidation of a state statute, while similar cases, such as a federal court's striking down of a nonstatutory state action on constitutional grounds, are at best candidates for discretionary review, perhaps even improvident grants.[20] This distinction between invalidation of a statutory action and a nonstatutory one risks placing form over substance. Surely the interests of the particular litigants are the same in either case.

Additionally, the authors would include in the discretionary docket cases that would serve as "vehicles for advances in the development of federal law" (p. 65). Presumably, the justices already view most cases they hear as presenting such an opportunity. Moreover, the thrust of the authors' argument calls for a move *away* from the indeterminacy of certiorari grants issued solely to "advance" federal law. The authors attempt to escape any possible contradiction by listing very specific instances of these discretionary grants (pp. 65-69), but the instances they cite may be so refined and specific as to be unworkable.

In addition to the case selection criteria, the authors advocate a number of innovations in the Court's internal processes: ending mandatory appellate jurisdiction (p. 117); adopting a requirement that litigants certify that a case warrants Supreme Court review under the selection criteria (p. 119); and, most interestingly, implementing a "second look" mechanism (p. 120). Under this last procedure, the justices would take an initial unrecorded vote on certiorari petitions, submitting any cases that receive the requisite four positive votes to an independent staff for evaluation. The staff would issue an advisory report recommending a grant or denial of the petition, and would then

19. P. 73. This position stems largely from the authors' view that the Supreme Court long ago ceased to be a court of last resort for individual litigants. *See, e.g.*, pp. 1-2.

20. P. 73. A federal court's *rejection* of constitutional claims likewise is not placed in the priority docket, unless it conflicts with Supreme Court precedent or creates an intolerable circuit split. Pp. 72-73.

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submit the case to the justices for reconsideration.[21]

If, as the authors argue, much of the Supreme Court's overwork problem is traceable to the false perception that the Court is a tribunal of last resort, eager to dispense individual justice, then surely the authors are correct in suggesting that the Court require litigants to certify that a case warrants Supreme Court review under the selection criteria. Perhaps an amendment to the Supreme Court Rules would serve to implement those guidelines. Regardless, an affirmative statement from the Court of its approach — whether it followed all, some, or none of this study's recommendations — would greatly help the legal community to adjust to the Court's *own* view of its role in the system, whatever that might be.[22]

Without such a statement from the Court, however, the ultimate value of this study may be difficult to gauge, since so many of the recommended changes involve the internal workings of the Court and the subjective perceptions of the several justices. Justice Stevens, for his part, has called the study "an unusually perceptive study of this Court's docket,"[23] but there is, as yet, no indication that the Court as a whole is moving toward any of the study's recommendations. Perhaps, as suggested by Judge Ruth Bader Ginsburg of the United States Court of Appeals for the District of Columbia Circuit, the imminent changes in the Supreme Court's membership will afford greater opportunities for the justices themselves to rethink the Court's role along the lines the study proposes.[24]

The real value of this study lies not in the particulars of what cases would or would not be heard, but in its attempt to revisit the unspoken assumptions that drive the various NCA proposals. Although the authors state that their goal is merely to stimulate debate — as they put it, to "invite others into the thicket" (p. 75) — the study accomplishes much more. Professors Estreicher and Sexton's provocative analysis not only can aid the Court in relieving its heavy case load, but can be a foundational prescription of the proper function of the Court, in the

21. P. 121. The independent staff would be "of the caliber of the Justices' clerks," and would be led by "a leading member of the Supreme Court bar." P. 120.

Professors Baker and McFarland characterize this "second-look" proposal as "bizarre." Baker & McFarland, *supra* note 1, at 1411.

22. The authors may implicitly recognize this point when they argue that the vagueness of Rule 17 serves as one cause of overgranting. Pp. 106-08.

23. California v. Carney, 471 U.S. 386, 398 (1985) (Stevens, J., dissenting). Justice Stevens cited the study, then unpublished, in its *New York University Law Review* form. *See* note 11 *supra.*

24. "Propitiously timed to coincide with changes in the Court's composition, the work should promote constructive discussion of the Court's core role and attendant responsibilities" (book jacket).

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hope of improving the administration and quality of federal justice at its highest level.

— *Robert S. Whitman*

THE BELIEVER AND THE POWERS THAT ARE. By *John T. Noonan, Jr.* New York: Macmillan 1987. Pp. xvii, 510. $35.

In *The Believer and the Powers That Are,* John Noonan[1] provides a unique perspective on the religion clauses of the first amendment,[2] one of the most controversial and chaotic areas of constitutional law.[3] Noonan does not attempt to create and impose a logical structure on the Supreme Court's religion clauses doctrine. Instead, he uses an interdisciplinary approach, primarily invoking history to provide an increased understanding of the clauses. Constitutional theorists routinely use history as an aid to interpreting the Constitution.[4] Noonan, however, does not utilize history solely to ascertain the Framers' intentions. Instead, he takes history one step further and tries to enable the reader to "empathetically appropriat[e] the experience that undergirds the constitutional principles of free exercise and no establishment" (p. xiii). This perspective allows the reader to appreciate the religious freedom available in America. Noonan thus provides an interesting approach to the first amendment; however, his lack of analysis leaves the reader unable to create a structure for the first amendment amid the Court's chaotic struggle.

Like most historians, Noonan proceeds chronologically. He divides the book into three sections: *Roots, The American Experience,* and *Contemporary Controversies. Roots,* reflecting Holmes's maxim that "[a] page of history is worth a volume of logic" (p. xiii), contains philosophical excerpts and historical anecdotes. The excerpts span a

1. John Noonan, Jr. is a judge on the U.S. Court of Appeals for the Ninth Circuit and the Milo Robbins Professor of Law and Legal Ethics, Emeritus, at the University of California at Berkeley. Perhaps best known for his book *Bribes,* Judge Noonan is considered "an authoritative lay Catholic scholar." Gillette v. United States, 401 U.S. 437, 470 (1971) (Douglas, J., dissenting).

2. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

3. *See, e.g.,* Marshall, *Introduction to Law and Religion Symposium,* 18 CONN. L. REV. 697 (1986).

4. *See* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U. PITT. L. REV. 673, 676 (1980) ("It is both appropriate and useful to begin all constitutional interpretation by consulting the historical intent of the Framers."). *Cf.* L. PFEFFER, GOD, CAESAR, AND THE CONSTITUTION: THE COURT AS REFEREE OF CHURCH-STATE CONFRONTATION 4 (1975) (using historical background only "to clarify the situation as it exists today").

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time period beginning with the Ten Commandments and ending in 1674. Noonan includes parts of the Bible and some letters of Augustine[5] in the description of the Roman period (pp. 3-20). The book then focuses on England.[6] Letters, governmental documents, and early books describing the law are represented.[7] Last, *Roots* focuses on those people who criticized religious intolerance and illustrates through letters and writings their thoughts and beliefs concerning church and state.[8] Noonan illustrates the factors that led to religious persecution in Europe and the theories that led to religious tolerance. Thus, by the end of part 1, the reader comprehends the behavior that drove men and women of the late seventeenth century to seek a place where leaders advocated religious freedom, and the theories upon which the concept of religious freedom was built.

Part 2, *The American Experience,* encompasses America's early struggle for religious tolerance and freedom. Noonan explores the battle leading up to the proposal and ratification of the first amendment and the writings of Madison and Jefferson. Noonan also describes the early doctrine of the religion clauses including the first church aid case,[9] and the first parochial school case.[10] This section, like the first, provides the perspective necessary to "empathetically appropriate" the origins of the religion clauses, but provides no real perspective on how these clauses are interpreted today. This is because, as many observers of religion clause doctrine have asserted, modern interpretation of the

5. Augustine, born in 354 A.D., was a pagan who converted to Catholicism. In 395 he was elected Bishop of Hippo in Africa. Noonan calls him "the most influential writer on morals for the Christian West." P. 12.

6. Pp. 21-60. England provides a backdrop for the struggle for supremacy between the Church and the State. The two legal systems overlapped, with the prince of the state involved with disputes over the property of the church and the church involved with issues that concerned public peace. P. 21. The events before the Magna Carta illustrate the power of the Catholic Church. When the see of Canterbury became vacant in 1205, a struggle ensued over who the electorates were. Pope Innocent III had the Cardinals he considered to be the electorates travel to Rome to vote. They chose Cardinal Langton; but Langton was not King John's choice. After a five-year struggle, John relented and conveyed his lands to the Pope, who gave the land back as John's fiefs. Pp. 27-29. Approximately 330 years later, during the reign of Henry VIII, secular princes were becoming more powerful. Henry wished to end his marriage to Catherine of Aragon, but the Pope refused to grant Henry an annulment. Finally, as the battle between the Church and the King of England came to a head, Parliament passed a general law, the Act of Supremacy, making the king the head of the Church of England and breaking with the Catholic Church. Pp. 52-54. Noonan considers this to be a "constitutional revolution," with the balance of power tilted toward "greater governmental control of the Church." P. 54.

7. Included are the writings of the clergy, including the Pope, pp. 30-31; portions of the Magna Carta, pp. 29-30; sections from Ralegh-Bratton's book on the laws of England, pp. 33-35; and writings of Thomas Aquinas, pp. 37-45.

8. Pp. 61-90. Governmental tolerance for religious differences really began in Germany when, in 1568, the Lutheran lords were granted legal toleration. P. 61. In 1573, the Polish nobility agreed to refrain from bloodshed over religious differences at the Warsaw Conference. Pp. 61-62.

9. Pp. 211-14. Bradfield v. Roberts, 175 U.S. 291 (1899).

10. Pp. 214-17. Quick Bear v. Leupp, 210 U.S. 50 (1908).

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clauses rests largely on post-World War II cases.[11]

*Contemporary Controversies* presents the modern doctrine: Supreme Court cases from 1940 to the present. Noonan groups the Supreme Court cases into six categories: (1) Sacred Duties, (2) Belief and its Organization, (3) Double Effect, (4) Education, (5) Political Participation, and (6) Sexual Morals. "Sacred Duties" contains cases in which the state prohibited activities that religious groups consider essential to the practice of their religion. This is commonly considered to be the issue of defining religion. Before a court can determine if the government has infringed upon a religious belief, it must, as a threshold matter, define religion.[12] The substantive areas of constitutional law in which this threshold question arises range from canvassing door-to-door promoting religion (and breaking a local ordinance prohibiting the solicitation of money for any religious reason)[13] to consuming peyote, a form of mescaline, which plays a central role in the ceremony and practice of the Native American Church.[14]

Once a court has dealt with this threshold question, it can address substantive issues. In the second category, "Belief and its Organization," Noonan includes cases that, in England in the thirteenth century, would have been heard in an ecclesiastical court (p. 35). The cases in this section deal with disputes over such issues as which faction of a church has title to church property. In "Double Effects," Noonan analogizes to other areas of the law where, if an action has both good and bad effects, the act is allowed if the good effects outweigh the bad effects (p. 339). Noonan places here the difficult cases where "a state practice has the constitutionally protected effect of permitting the free exercise of religion and the constitutionally prohibited effect of establishing religion" (p. 339). As the Supreme Court has commented, "[t]he Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[15] This problem arises, for example, when a state prohibits religious or political meetings in a public park.[16]

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11. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817 (1984) ("Despite the customary invocation of James Madison and Thomas Jefferson . . . scholars know that the present doctrinal approach stems from post-World War II Supreme Court decisions.").

12. *See* Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984); Johnson, *supra* note 11, at 831-39.

13. P. 234. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).

14. P. 291. *See* People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

15. P. 344 (quoting *Walz v. Tax Commn.*, 397 U.S. 664 (1970), *reprinted at* pp. 342-52).

16. That is, in order to ban religious speech from the park, the city must determine what speech is considered religious, and this may have the effect of promoting some religions over others. A second example is the exemption of church property from taxes. An argument can be made that by exempting religious organizations from taxation, the state indirectly encourages individuals to make contributions to religious bodies, thereby violating the establishment clause.

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The fourth group of cases, which Noonan calls "Education," is really a subdivision of the previous group, "Double Effects." It exhibits most clearly the inconsistencies in religion clause doctrine. Although a state may furnish books, lunches, and diagnostic services to church-run schools, it cannot provide maps, magazines, tape recorders, or salary supplements (p. 395). Group five, the "Political Participation" section, also clearly illustrates the clash between the two clauses. Most illustrative is *McDaniel v. Paty,*[17] where the Supreme Court struck down a law disqualifying ministers from holding legislative offices. The Tennessee Supreme Court had held that the law was justified as a means of restricting religious activity "in the lawmaking process of government — where religious action is absolutely prohibited by the establishment clause" (p. 445). The Supreme Court reversed, stating that the statute actually inhibited religious freedom by forcing a choice between political participation and religious activities. Finally, "Sexual Morals," group six, illustrates the role that religion has played in cases concerning sexual conduct. It includes cases covering sodomy, interracial marriage, and polygamy.

Noonan's book is basically descriptive. It supplies the primary documents that shaped the religion clauses and the seminal cases that guide the Supreme Court's current analysis. While Noonan's unwillingness to analyze the Supreme Court's decisions concerning the religion clauses sets him apart from other contemporary writers,[18] it also limits his book. Noonan wants "[t]o capture the legal process relating to religion in time, to push back to the experience at its roots and carry it forward to the present" (p. xvi), and this he does with resounding success. The book is a fascinating compilation of material for anyone interested in a broad descriptive overview of religion and history. If, however, the reader is searching for a method for thinking about religion in America, or for answers to important contemporary questions about first amendment jurisprudence, this book does not supply them. *Contemporary Controversies,* the book's third major section, reads like a law school casebook, but with even less guidance than most casebooks provide. For a reader with no background knowledge, the meaning of the cases is elusive, partly because only short excerpts of cases are included. But for a reader with the background to impose his own order upon the cases, the book most likely would be of limited value, since the reader will have read many of the primary sources.

Noonan's book, then, is paradoxical. If the reader knows nothing about the relationship between religion, history, and the religion clauses, parts of the book provide a good introduction. Yet, for that

17. 435 U.S. 618 (1978).

18. *See, e.g.,* S. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE (1972); P. KAUPER, RELIGION AND THE CONSTITUTION (1964); L. LEVY, THE ESTABLISHMENT CLAUSE (1986); L. PFEFFER, RELIGION, STATE AND THE BURGER COURT (1984).

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reader, other parts of the book, such as *Contemporary Controversies,* are quite confusing. Perhaps this book's best function is to act as a starting point for someone interested in learning about the religion clauses. The reader who wants answers will have to look elsewhere.

— *Elizabeth Ferguson*

THE ROLE OF STATE SUPREME COURTS IN THE NEW JUDICIAL FEDERALISM. By *Susan P. Fino.* Westport, Conn.: Greenwood Press. 1987. Pp. xxi, 154. $29.95.

The Reagan administration and a strengthened conservative presence on the United States Supreme Court has maintained a rhetoric, if not a consistent policy, of increased attention to and support of federalism and state power. The recent roots of this trend are arguably in the 1970s with the Burger Court. A new interest in federalism for liberals arguably sprouted from these same roots. As the Burger Court pleased conservatives by drawing back from and limiting the Warren Court's expansive protection of individual rights, most notably in the criminal defense area, liberal interests found hope in state court decisions utilizing state constitutions to provide greater protection for individual rights.[1] This apparent new emphasis on states and state courts has been referred to as the "New Federalism" or as the "New Judicial Federalism."[2]

Professor Susan P. Fino,[3] in her book *The Role of State Supreme Courts in the New Judicial Federalism,* understands "[t]he new judicial federalism [to] require[ ] state supreme courts to take on increased responsibility in constitutional interpretation in general and the development of a tradition of state constitutional interpretation in particular" (p. 35): in essence, to act as the functional equivalent of federal courts for constitutional interpretation. Fino attempts to create a *system* of analysis that will expand and strengthen our understanding of how state court systems work and why they vary in performance. Knowledge of what makes a "good" court good[4] should allow state courts

1. *See generally* Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977).

2. *See generally* Weinberg, *The New Judicial Federalism: Where We Are Now,* 19 GA. L. REV. 1075 (1985); Weinberg, *The New Judicial Federalism,* 29 STAN. L. REV. 1191 (1977); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court,* 62 KY. L.J. 421 (1974).

3. Assistant Professor of Political Science, Wayne State University.

4. [A] "good" state supreme court is one which is committed to the development of an independent body of state law through the rendition of principled decisions. Here, principled decisions are those based upon more than personal whim or exigent circumstances;

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better to fulfill the needs of the new judicial federalism. The book is primarily a description of court performance, rather than a proposal and defense of a specific theory of court performance.

Fino follows two primary paths of analysis. First, she lays out a model of state supreme court performance that relies on certain institutional and contextual factors which, she believes, explain and predict court performance.[5] The model is built largely upon earlier social science studies which attempted to identify and describe discrete aspects of the interrelationship of these factors.[6] The model consists of seven factors, including "Political Culture," "Characteristics of and Role Perception of the Justices," "State Judicial System," and "Socio-Economic Development and Diversity."[7] Fino discusses how the different factors might be expected to influence court performance. For instance, under the category of "Political Culture" Fino identifies three different political cultures (Individualistic, Moralistic, and Traditionalistic)[8] and predicts what performance characteristics we should expect to find in the legal and political system of a state with any given culture.

Fino's model predicts that a state with an Individualistic political culture will emphasize marketplace values, with an attendant triumph of private concerns over community interests.

> [S]ince the pure Individualistic culture is devoid of community interests, the role of government is to serve as referee among many competing

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instead, principled decisions embody historical and legal considerations which help to make the law knowable. . . . By this definition, a "good" state supreme court is also an "activist" supreme court in the development of state law.

P. 5. Fino quantifies the "good," or "activist," state court by measuring (1) how often opinions rely upon independent and adequate state grounds, (2) how often precedents from other states are cited, and (3) how often law review or other scholarly work is cited. *Id.*

5. Institutional factors are those characteristics of the court system that are man-made and organizational in nature. Examples would include the existence of an intermediate level court, discretionary review by the state supreme court, and the selection process for judges. Contextual (or noninstitutional) factors are more difficult to characterize, but act as important background influences on the court system and the attendant institutional factors. Political or religious cultures and socioeconomic development are characterized as contextual factors. Given the greater degree of control that may be exerted over institutional factors, they offer the more promising path towards improved performance and receive more attention from Fino than contextual factors.

6. Some of the researchers Fino draws upon include Daniel J. Elazar, Austin Sarat, John R. Schmidhauser, Douglas C. Chaffey, Kenneth N. Vines; the teams of Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman and Stanton Wheeler; and Burton M. Atkins and Henry R. Glick.

7. These four factors receive the most attention from Fino. The other factors are "Legal Culture," "Litigation," and "State Government."

8. The three major political cultures are said to form imperfect geographical patterns. "Generally, the Individualistic culture prevails in the northeastern states, the Traditionalistic dominates in the South and the Moralistic in the Midwest." P. 26. The western states are recognized as problematic, displaying mixtures of cultures. Fino spends substantial time discussing political culture, even claiming success "in treating [it] as a legitimate independent variable." P. 43. The admitted 'crudeness' of these generalization and their assignment to various census bureau regions leave doubt in the reader's mind as to their validity and usefulness.

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> individual interests, not to implement any broad policy of the public good. Therefore, I believe that, in general, litigation rates in [Individualistic] cultures will be relatively high, and I would expect to find challenges to economic regulation as well as a good deal of private litigation in the courts. [p. 10]

Fino also suggests that, in such a system, we should expect to find career judges who are well salaried and in a highly bureaucratized system, reflecting the marketplace value of efficiency.

The heart of the book is the second path of analysis, where Fino attempts to *measure* state supreme court performance with empirical work gathered from six state court systems and case opinions from 1975 and 1977.[9] Fino closely examines three specific variables of state supreme courts in an effort to test the utility of her predictive model and the accuracy of her specific predictions, such as those just discussed with a state having an Individualistic political culture. Listed below are the three variables and just a few of the subvariables she considers:

| *Institutional Structure* | *Judges' Background* | *Docket* |
|---|---|---|
| recruitment method | education | caseload |
| system size | political activity | legal issue |
| salary | religion | dissenting & |
| levels of courts | military service | unanimous opinions |

Fino discusses these areas in separate chapters before considering them together for each of the six state supreme courts. In bringing together these variables Fino "suggest[s] that state internal unity, political culture and institutional characteristics of the state judiciary are related to the performance of the courts although the relationships are far from perfect" (p. 87).

Fino considers each state in turn and engages in both statistical analysis and "impressionistic application of the model of performance" (p. 87). She tries to determine whether her predictions are accurate. For instance, an Individualistic culture is attributed to New Jersey, and Fino concludes that its judicial system exhibited a number of the expected institutional characteristics, including well paid jus-

9. The six courts examined are those of Arizona, California, Kentucky, Michigan, Nebraska, and New Jersey. They are chosen as representative of each of the six categories in a classification system Fino develops to ease and standardize research and comparison. The classification system is based upon forms of judicial recruitment, cross tabulated with points scored on a System Size scale. These points are a function of support staff, number of judges in the intermediate courts, number of judges in the trial courts, and salary.

The 1200 opinions studied are from 1975 and 1977, and are chosen as representative of "the beginning of the interest in the new judicial federalism." P. xii. Fino bases her opinion analysis upon a coding system whereby every opinion is given a series of numbers to represent its holding. There are five series or major areas of coding: 100 Series, Federal Constitution; 200 Series, State Constitution; 300 Series, State Statutes; 400 Series, Common Law; 500 Series, Federal Statutes. Then within these series there are specifically assignable categories such as 100 Supremacy Clause, 101 Separation of Powers, 102 Qualifications, election of legislature, etc.; or 400 Estoppel, 401 Standards of proof, 402 Burden of proof, etc. *See* Table A.5, p. 134.

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tices who were well supplied with secretarial and clerical assistance. However, it scored lower on the judicial professionalism scale than predicted for an Individualistic culture. Such conflicting results were common.

Fino's quantitative analysis of these variables offers some interesting profiles of state supreme courts and addresses some existing assumptions about state supreme court performance. However, the results are generally inconclusive. Institutional variables appear to have more predictive utility than contextual variables, but are themselves still rather limited. The existence of an intermediate tier of courts, subject to discretionary supreme court review, is the one factor Fino shows to offer some correlation with a "good" state supreme court. But the overall limited utility of her predictive model leaves one wondering if her method of analysis is worth the effort.

What is worse, Fino's presentation discourages the reader with confusion. The confusion is largely a result of the humbling task of attempting to quantify state supreme court behavior. Fino's general model interrelates many pressures influencing state supreme courts. In quantifying the variables necessary to her model and in attempting to organize and clarify the variables, Fino creates an almost unfathomable fog. The discussion relies heavily upon models, variables, subvariables, and scales of measured performance. Though the reader encounters little that is more complex than percentage comparisons, the reader might easily become lost in a sea of "factors," "variables," and "models." This is admittedly the heart and soul of Fino's research; but better graphic and organizational explication would have been helpful. The graphs and tables used to supplement the text are inconsistent and of limited assistance in comparative analysis of the different state courts. For example, with each state Fino discusses, she provides a pie graph to show what percentage of a docket any general issue (*e.g.*, state rights, state power, common law, civil procedure, etc.) occupies. However, the issues portrayed are not the same for each state, and this limits the ability to make comparisons between the states. Given that one of Fino's goals is to identify those qualities that make the better state courts better, in hopes of reproducing them in other courts and improving their effectiveness in the new judicial federalism, the ability to compare states is important.

Future work of such a quantitative nature should broaden the data base: Inclusion of more states will make patterns of contextual factors easier to identify, if they exist; consideration of case opinions over a longer period of time will allow for the appearance in shifts in performance. Also, if Fino's hope is to help state courts become the functional equivalent of federal courts for the purpose of constitutional interpretation, it might be useful to make a similar study of the federal courts and then make a state-federal comparison. Such quantitative

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studies are not only theoretically difficult but practically demanding given the large amount of information that needs to be reliably quantified, and therefore it is unlikely that such extended studies will pour forth from researchers.

Fino's title offers the promise of an interesting federalism discussion with insights into the interaction between state courts and federal courts, and the interpretation of state and national constitutions. Yet while Fino presents an ambitious and challenging method of analysis, the book leaves the reader unsatisfied and frustrated. This book offers some interesting but limited insights into the specific courts discussed, as well as factors to consider in the study of state courts. It is not an easy book to read or digest, and it is not recommended to the casual reader; the insights are too limited for the effort expended. For those seriously interested in the functioning of state courts, and possible new ways of analyzing these courts, this book may be worth consideration. But be prepared with pencil and paper nearby to keep track of all the variables and subfactors, and a mind ready to critically evaluate the validity of underlying assumptions.

— *Jonathan T. Foot*

CONSTITUTIONAL OPINIONS: ASPECTS OF THE BILL OF RIGHTS. By *Leonard W. Levy.* New York: Oxford University Press. 1986. Pp. viii, 272. $32.00.

Throughout Leonard Levy's career the prime focus of his scholarship has been on the origin and development of important constitutional provisions.[1] *Constitutional Opinions* is a collection of twelve independent essays drawn predominantly from Levy's previous works.[2] The book is a survey of Levy's own constitutional interests and scholarship. The themes Levy touches on include freedom of speech, religious toleration and religious establishment, and the right against self-incrimination. The historical time periods he addresses begin in seventeenth century England, move to the period during and

1. Leonard W. Levy is the Andrew W. Mellon All Claremont Professor of Humanities and Chairman of the Graduate Faculty of History at the Claremont Graduate School. His 1968 book, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION won the Pulitzer Prize for History. His numerous other writings include: EMERGENCE OF A FREE PRESS (1985); TREASON AGAINST GOD: A HISTORY OF THE OFFENSE OF BLASPHEMY (1981); AGAINST THE LAW: THE NIXON COURT AND CRIMINAL JUSTICE (1974); and JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE. (1963).

2. Only one of the essays is new, the other eleven are revised or exact reprints from earlier books and articles published by Levy. The author identifies the original sources of the reprinted or revised works in his acknowledgements.

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immediately following the passage of the United States Constitution and Bill of Rights, and finally turn to the Supreme Court during the Warren and early Burger years. Levy does not dwell on the institutional and economic forces of history as do many modern historians. He instead explores the often complex personal motivations and opinions of historical figures such as John Lilburne, James Nayler, John Peter Zenger, and Thomas Jefferson.[3]

One of the book's most interesting essays, entitled "The Original Meaning of the Establishment Clause," analyzes the intended meaning of the first amendment's establishment of religion clause, at the time of its passage.[4] The Supreme Court has adopted a broad interpretation of this clause, holding that the first amendment prohibits not only government preference of one religion over another, but also impartial government support to all religions.[5] Many scholars support an equal protection interpretation, asserting that the clause was originally intended only to prevent government preference of one religion over another.[6] Levy acknowledges that historical evidence falls short of the crystal clarity that advocates of both positions claim, but concludes that "[a] preponderance of the evidence . . . indicates that the Supreme Court's interpretation is historically the more accurate one" (p. 136). Having revealed to the reader his conclusions, Levy proceeds to present the existing historical evidence for both positions together with his interpretations of the evidence. While Levy would like to convince the reader of the correctness of his position, it is worth noting that he puts forth all the evidence for the reader to draw his own conclusions. The following paragraphs will review the analysis and evidence Levy presents in his essay.

Levy's review of establishment clause history begins with the Constitutional Convention of 1787 and the state ratification controversies that followed. Those who attended the Convention intentionally

3. The titles of the individual essays are good indicators of their content: *Freedom of Speech in Seventeenth-Century Thought; John Lilburne and the Rights of Englishmen; Quaker Blasphemy and Toleration; Did the Zenger Case Really Matter? Freedom of the Press in Colonial New York; Constitutional History, 1776-1789; The Bill of Rights; The Original Meaning of the Establishment Cause; Liberty and the First Amendment: 1790-1800; Jefferson As a Civil Libertarian; History and Judicial History: The Case of the Fifth Amendment; Subversion of* Miranda; and *Judicial Activism and Strict Construction.*

4. Pp. 135-61. Levy does not deal with the conflicts and interaction of the establishment and free exercise clauses of the first amendment. This question, as much as the original intent debate, has engaged the attention of the United States Supreme Court and legal scholars. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT L. REV. 673 (1980).

5. See, for example, Justice Black's influential dictum in Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947); Wallace v. Jaffree, 472 U.S. 38 (1985).

6. *E.g.*, R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); M. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978); C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES (1964).

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chose not to include a bill of rights. They believed the negative implications of the enumerated powers and the structure of the federal government itself would be sufficient to safeguard the liberties a bill of rights was intended to protect.[7] Opponents of a strong federal government used the lack of a bill of rights to agitate against passage of the Constitution during the ratification process. In response, many state conventions included recommendations for a bill of rights in their resolutions approving the Constitution (pp. 139-42). The Virginia Convention, for example, recommended an amendment stating "that no Religious Sect or Society ought to be favored or established, by Law, in preference of others" (p. 141; citation omitted). Levy sees recommendations for amendments by the state constitutional conventions as attempts to mollify critics and allay public fears, rather than as attempts to put forth serious proposals for amendments.[8] For this reason Levy chooses to rely more heavily on other evidence to determine what was intended by the establishment clause.

Scholars on both sides of the establishment clause debate cite the congressional debates on the establishment clause in support of their position. Madison's original draft proposal to Congress read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed" (p. 144; citation omitted). Proponents of an equal protection interpretation view the use of the adjective "national" as strong support for their position (p. 144).

Levy agrees the words on their face might lend themselves to such an interpretation, but believes it would require drastic and unexplained shifts of opinion on Madison's part. In 1785, four years earlier, Madison helped lead the opposition to a Virginia tax for the support of Christian religions generally. Madison repeatedly referred to the proposal as an "establishment of religion" in his famous *Memorial and Remonstrance* (p. 144). Shortly after the Bill of Rights passed Congress, Madison opposed a bill to set aside land for the nonpreferential support of religion in the western territories. Madison vehe-

7. Pp. 105-06, 136-37. This is not to say members of the Constitutional Convention always opposed government interference with matters that ultimately were protected by the Bill of Rights. In the case of religious establishment Levy asserts, "[m]any contemporaries, especially in New England, believed that governments could and should foster religion, or at least Protestant Christianity. All agreed, however, that the matter pertained to the realm of state government and that the federal government possessed no authority to meddle in religious matters." P. 142.

8. Levy concludes:

> They do not even necessarily indicate that preference of one sect over others was all that was comprehended by an establishment of religion. They do indicate that preference of one sect over others was something so feared that to assuage that fear by specifically making it groundless became a political necessity.

P. 142.

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mently opposed the measure, describing it as unjust and outside the authority of Congress (p. 144).

The House debates were not recorded verbatim. Levy finds the summary of these debates to be of little value in determining the original meaning of the establishment clause. He concludes: "That the House understood the debate, cared deeply about its outcome, or shared a common understanding of the finished amendment is doubtful" (p. 147). This conclusion stems both from statements made in the course of the debate and from Levy's broader thesis that the Federalists felt the Bill of Rights unnecessary, supporting it only to devalue the political capital of those opposed to the new federal system.[9] The final proposal submitted to the Senate read: "Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed" (p. 148).

The Senate passed a proposal reading, "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion" (p. 148). The language appears to have a narrow scope, but the Senate before passing this version rejected versions which clearly stated the clause prohibited only the preference of one religion over another (p. 148).

While the House readily accepted many of the Senate proposals, it rejected the Senate religion amendment. The House stuck to this position in the Conference Committee that followed. Eventually the Chairman of the Senate conferees reported to the Senate that the House would accept the Senate version of all other amendments if the Senate would accept a version of the establishment clause giving it the present phraseology. In Levy's opinion, the House position can be explained only if the House intended to prohibit more than mere preferential treatment of one religion over all others (pp. 148-49). This deal was accepted by both houses and the amendments were sent to the states for ratification (pp. 148-49).

While there are few records of the ratification debates of most states, abundant materials remain from Virginia's deliberations. Eight anti-Federalist state senators attacked the establishment clause of the Bill of Rights as inadequate to prevent even discriminatory federal funding and support of religion. The only effect, according to the Senators, was to prevent the formal designation of a proscribed national religion (p. 150). To many scholars the opposition of these eight Senators is the strongest evidence supporting the narrower, equal protection interpretation (p. 150).

Levy disagrees with this interpretation, believing the opposition's interpretation a political maneuver designed to swing public support against the Bill of Rights. The opposition's real agenda was to force a

9. P. 147. For a more robust development of Levy's thesis that the Federalists did not believe the Bill of Rights to be important, see Chapter Six, *The Bill of Rights,* pp. 105-34.

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new Bill of Rights that would include greater limits on Congress's commerce and tax powers (pp. 150-51). Madison, who led the ratification fight in Virginia, wrote to President Washington that the opposition's interpretation was clearly contrary to the intended and commonly understood meaning. Additionally, the eight opposition senators had in the past consistently supported state taxes to support religion. Those supporting passage had been the champions of rigid church-state separation (p. 151). Levy concludes that Virginia's passage of the amendments over the objection of the opposition is best read as a rejection of a narrow reading of the establishment clause (p. 152).

In the final sections of the essay, Levy reviews state constitutional and statutory provisions relating to support for religion in an attempt to understand the colonial American definition of "establishment of religion." Levy believes many scholars have incorrectly looked to the European meaning of establishment in an attempt to understand its usage in the United States. The American tradition, Levy believes, diverges from that of Europe, where establishment meant that a single church enjoyed monopolistic privileges and a legal stamp of approval by the government (p. 152). He concludes that "[a]n establishment of religion in America at the time of the framing of the Bill of Rights meant government aid and sponsorship of religion, principally by impartial tax support of the institutions of religion, the churches" (p. 161; emphasis omitted).

At the time of the passage of the Bill of Rights, six states had constitutional provisions or statutes which allowed state support of religion (p. 161). The religions these provisions supported were not limited to one church but meant state support for "[m]any different churches, or the religion held in common by all of them, i.e., Christianity or Protestantism."[10] These state establishment provisions were in essence establishing a nonpreferential, nondiscriminatory support system for a large number, or in some cases all, of the religions present in the state.

10. P. 161. The experience in New York is illustrative. When the English gained control of New York in 1664, the Dutch Reform Church was disestablished as the official religion. In its place a system developed whereby every township was obligated to support a Protestant church and minister of the town's choice. Many different Protestant religions benefited. P. 153. In 1688 the English government instructed its governor of New York officially to establish Anglicanism as the commonwealth's religion, but the bill that eventually passed in the legislature provided only for the support of "a good and sufficient Protestant Minister." Pp. 153-54; citations omitted. For the next fifty years Anglicans and non-Anglicans argued over whether the bill established only the Anglicans or established all Protestant religions. The confrontation was particularly reflected in the organization of King's College (later Columbia University). Anglicans asserted that they, as the established religion of the Colony, should be given exclusive control of the school. The opposition insisted that the establishment was of no particular church but of the Protestant denomination generally. P. 154. Levy concludes, "the concept of a multiple establishment of religion was not only understood by but also engaged the attention of the inhabitants of colonial New York." Pp. 154-55.

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Virginia debated whether to provide for state support of religion officially just four years before the passage of the Bill of Rights. The 1785 confrontations in Virginia over whether the state should pass a bill giving nonpreferential support to all "Christian religions" provides much evidence as to Madison's feelings about even nonpreferential support. In notes for his speech against the measure Madison argued religion was a matter of private, not public concern. He described the nonpreferential system he opposed as an establishment of religion. "The true question, [Madison] declared, was not 'Is religion necessary?', but rather 'Are religious establishments necessary for religion?', to which he argued in the negative" (p. 160; citation omitted). The bill was eventually defeated and the legislature passed instead Thomas Jefferson's "Bill for Religious Freedom" (pp. 160-61). That bill provided in part "that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever" (p. 160; citation omitted).

Levy's final conclusions about the meaning of the establishment clause are that:

> No member of the First Congress came from a state that supported an exclusive establishment of religion; no such example could have been found in the America of 1789. Of those states that provided public support for religion, half of them had provided for such at least theoretically since the early eighteenth century; the remainder did so from the time of the American Revolution. Their experience told the legislators in 1789 that an establishment of religion meant not state preference for one religion but non-preferential support for many. [p. 161]

Levy's historical essays are for the most part thoughtful, well reasoned, and well researched. Surprisingly, five of the essays contain no footnote references, a weakness for those wishing to do further reading on the subject of those essays.[11] In two essays Levy departs from historical analysis and enters the judicial activism debate.[12] These essays are not as powerful as Levy's historical pieces. Levy does not take the space to develop fully the public policy arguments he is making and fails to acknowledge the existence of opposing arguments. What is left often comes across as a series of shrill, personal attacks on the Burger

11. Those essays are *Freedom of Speech in Seventeenth-Century Thought, Constitutional History, 1776-1789, The Bill of Rights, Jefferson As a Civil Libertarian,* and *History and Judicial History: The Case of the Fifth Amendment.* Other essays contain extensive footnoting.

12. In *Subversion of* Miranda, Levy attempts to show why he believes the opinion of the Court in Harris v. New York, 401 U.S. 222 (1971), was "one of the most scandalous, extraordinary, and inexplicable in the history of the Court." P. 210. In *Harris,* the Court allowed the use of an illegally obtained statement of a criminal defendant against the defendant for the purpose of impeaching the defendant's testimony. In *Judicial Activism and Strict Construction,* Levy defends the Warren Court's "judicial activism" against charges of criminal-coddling and subverting the role of legislatures, which were made by supporters of the Burger Court and "strict construction."

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Court and the Court decisions Levy disagrees with.[13]

Overall, the book is written with clarity and enough background information to be accessible even to those unfamiliar with the legal history involved. The rich detail and analysis make most of the essays interesting to those familiar with the topics as well. The book is worth recommending to anyone with an interest in the historical background of many of today's most important and controversial constitutional provisions.

— *Kenneth F. Sparks*

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13. An example from *Subversion of* Miranda will serve to illustrate this point. In describing Chief Justice Burger's majority opinion in *Harris,* 401 U.S. 222,

> [n]ever to be forgotten is that Harris plainly denied the truth, that the defendant did claim his statement was involuntary, and that the Court did permit the use of a statement which it conceded had been illegally obtained. The Court's elephantine misrepresentations and mangling of precedents could not have been deliberately calculated. Incompetence may have some claim to an explanation of *Harris.* But the truth about it, which cannot be known, probably derives from the same sort of zeal that drives the police to become lawless in the act of apprehending and interrogating suspects.

P. 220. This is not to say that Levy is wrong in his conclusions or that he is intentionally malicious. It is only to point out that Levy does not appear to add any new ideas to a debate that has raged for years.

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